

THOUGHTS ON THE CONSTITUTION OF PAKISTAN

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AUTHOR'S PREFACE

Of all the sciences and of all the arts in the world Political science in the most inexact, It is a science of tendencies which are incommensurable by any except the most imaginary thermometers. For although there is much heat in politics, that heat is not controlled 'by any immutable law of thermo-dynamics. Fashionable theories of to-day become forlorn and rejected within a short time and new gospels are always in the horizon. To-day, the theory of race purity, to-morrow the brotherhood of man, day after to-morrow the protection of capital, and day after that nationalization of all property. such are the waves that are continuously breaking upon the sands of time throughout the ages. Hence the application of these abstract tendencies in the constitution of a new-born state is not a very enviable or enjoyable task in any age. Many a solon. Pericles, Hammurabi, many a St. Augustine, Roesseau and Bentham have foundered in the morass of political ideas where only a few have survived the ravages of time. Yet all who have failed and all who have succeeded have equally left indelible marks of foot prints which would be immensely beneficial to the weary traveller who wants to travel in quest of the ideal constitution.

The contributions of Islam to the political advancement of the world is now-a-days a favourite topic. Still, the author confesses, he has found little help from the extant authorities as to what those contributions were. The present work embodies the research of a number of years carried sporadically off and on in the midst of

multifarious and arduous nature of work of a country Lawyer who has neither the advantages of consulting any National Library, nor that of pursuing the vocation of a student of political theory for any length of time, its shortcomings may therefore be excused by the gentle reader who can easily understand the hurry in which the whole work has been completed and rushed through the Press.

In this endeavour I have been immensely helped by the Translation of the Holy Quoran by Aliama Yusuf Ali whose translation in English is by far the best I could avail myself of. I have changed the metres here and there to make the meaning clear but the language has not been touched upon. My grateful thanks are due to Principal Major A. R. Joardar of Jessore College and Janab Moulvi Wahed Ali Ansari, Editor, Jessore Gazette, without whose whole-hearted co-operation and help in every matter this work would probably have never been completed, its shortcomings are many and may be rectified in future editions if the generous public likes the work at all.

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INTRODUCTION.

The growth of human civilization from the state of rude barbarism of the ancient cave and forest dwellers to the present day supernational states, is a fruitful study to all statesmen and philosophers. Unfortunately, statesmen have the least time to study the enthralling subject of the rise, growth and decay of nations conglomerated into states of various designations and denominations. In ancient Greece Plato and his disciple Aristotle spent their valuable lives in studying the classification of states. Plato in the height of his beautiful imagination pronounced the verdict that unless philosophers were kings or kings philosophers humanity had hardly any hope of peace and progress.

Since the time of Plato, although much time has elapsed, and much has been written around and against his verdict on the future evolution of the state, his dictum practically stands unassailed, on a firm foundation. But after the experiments of the last two thousand years it is possible to add a rider to the dictum of plato that unless kings become phillosophers or philosophers king, to make good govern possible the kings of Rulers must rrr

to the written or unwritten laws of the Constitution, which must be based, not on arbitrary caprices of the tyrant or the benevolent despot, but on sound principles of policy enunciated during the ages by the philosophers and tested during the rise, decline and fall of empires, kingdoms and states.

Thus the present-day Rulers would have the counsel of the best philosophers of all times within the frame-work of a well-balanced written constitution, and even philosopher-kings would do well to be guarded by the same, for human weakness may be prone to transgress an unwritten law, whereas a written law would be jealously guarded by the Judiciary which is necessarily the most learned and the most impartial tribunal in the modern states. It is thus that through the evolution of ages, England now remains the only country in the world without a written Constitution, although the conventions of its constitution have practically been as much firmly established and publicised as the written laws.

It is the verdict of history that the greatest empires of the world would perish unless they are established on the foundation of a well-balanced constitution, chosen and adopted by the free suffrage of the people that compose it. Conquest has never the hall mark of permanence. Injustice destroys itself by its own inequity.

Inequality breeds revolution which gives rise to further inequity. However brilliant the temporary effulgence of the greatest of the ancient kingdoms and empires, all have gone down the normal process of decay and annihilation, sometimes swiftly, sometimes, more slowly, out of the ruins of which new nations, races and empires have arisen. And history is going on repeating itself. With what result?

The panorama of history thus poses the question ultimately, what is the lot of the common men? States may come and states may go but, man remains for ever. Has the common man the fundamental Rights of Peace, Justice and Equality? Perce to allow him time to exert himself to the utmost for the realization of his best self. Equality of opportunity and equality of status, so that he may not be thwarted by artificial ties and artificial impediments in the struggle for the attainment of his best self. And Justice, when his own development clashes with that of his fellow man. If the state cannot guarantee these primary fundamental rights to the common man it has no right to exist and is bound to perish.

These fundamental rights of the common man has been proclaimed, from the minaret, pulpit and platform in practically all ages, and have gradually won recognition in the most conservative circles. But still

on blundering and groping its way towards the brink of ruin and disaster goaded by its frenzy of madness and inequity. Man is to-day spending more towards evolving engines and chemical formulas for self-destruction than for self-preservation. Man in his senseless race to enjoy the world more is going to annihilate himself with the earth itself. The reason is not far to seek. All our philosophy and science are lacking in spiritual values. We are all invoking the same God to destroy God's creation and like the spoilt child praying for power to have to cake and eat it too. And what our philosophers are condemning in the child, are extolling in the man and every man and every nation goes on persistently erring in the path of self-destruction.

Thirteen Hundred years ago in the deserts of Arabia, the Holy Prophet Mohammad gave the Quoran to world for its guidance. The abstract principles of justice, equality, fraternity and liberty were given *institutional* expression in the Quoran through clearly defined Rules of external conduct and internal harmony, which if followed would decidedly lead the individual and the state to material and spiritual peace and progress. The Quoran claimed itself to be the

"Zulekal Ketabo Laraiba feeh
Hudallel Muttaqucen."

" This is the book,
In it is guidance sure
for those who fear God."

The Quoranic religion was called Islam. Islam did not claim itself to be any "ism" or set of doctrines particularly recommended by the Prophet, but its simple meaning was "Peace". Glory to God and goodwill to mankind was its keynote. This goodwill to mankind was not meant to be an abstract goodwill like a pious wish but was to be cultivated by following the Rules of Guidance laid down in the Quoran for every man and every state. The rules as set forth in the Quoran were intended to lead the common man through the straight path "Serat-ul-Mustaquim" and the straight path was also clearly shown to be the "steep path", the path which is difficult because it is straight and from which man is prone to be deviated in every age, on account of his avarice and greed.

With the advent of the Quoran the world was at once metamorphosed. The desert candle illuminated the whole world and its rays lit up the darkest corners of the world by the effulgence of its glory. By sheer weight of their remodelled character in the light of the Quoranic teachings the Arabs conquered the whole civilized world and the two grand empires of Persia and Rome

pieces by the simple touch of its magic wand. But the end of the travails of the world were not yet in sight. Gradually the beautiful teachings of the Quoran were lost sight of in the midst of the magnificence of its conquests and again man gave up the straight path because it was also the "Steep path" in a world of continuous snares of luxury and ease which begot oppression and injustice. A drop of injustice is enough to spoil a world of peace as a drop of filth is enough to spoil the entire milk in the cistern. While the great Imams and other savants managed to preserve the "Shariat" or the Personal Law of the Muslims intact, from absolute annihilation through the ages, the "constitutional law" as adumbrated by the Quoran was neither developed to that extent nor handed down from Ruler to Ruler, from kingdom to kingdom, so that the Islamic principles of constitutional law were practically lost sight of after the period of the four Caliphs who were companions of the Prophet, that is the Kholafa-e-Rashidin.

Since then the conception of an Islamic State has been envisaged by many Muslim divines and saints although the Islamic principles were actually incorporated in other systems and other States of the world. Nearer the times the great Jamal-ud-din Afgani, and Iqbal the poet-philosopher of Asia dreamt of

the advent of the Islamic State and Iqbal in his letters to the Quaide-e-Azam Mohammad Ali Jinnah actually gave the idea which saw its fruition in the birth of Pakistan.

With the birth of Pakistan, all the Muslim States in the world got a new lease of life and a new impetus to see the formation of a true Islamic state. The birth of this infant state was hailed with all sorts of doubts, evil auguries and lamentations regarding its economic stability and political feasibility. Actually the world had yet to see a state with two limbs two thousand miles apart unconnected with any corridor or land connection and naturally political philosophers were left gasping at the birth of this "infant terrible". Economic wizards could see no hope of its financial self-sufficiency or stability and its birth was tolerated in the mere expectation of a quick collapse.

Gradually but surely and quickly the infant child has already been kicking the unbelieving wizards of the financial and political world. By holding its own against the combination of the star nations of Europe in the U. N. Assembly, by deciding its financial independence of the entire world by the bold and inconceivable step of non-devaluation, by saying every word after deep deliberation and meaning every word it says, Pakistan has to-day earned the admiration of the whole world and

tratitude of all Islamic countries.

It is necessary, therefore, that its Constitution must be well-planned and well adapted from all the political philosophies and constitutions of the world, consistent with the rules of guidance as laid down in the Quoran. The Principles and the broad rules are already at our door in every hearth and home, handed down from generation to generation in the Holy Book. The details are to be winnowed and garnered from the experience of man in every age as contained in every constitution, modern as well as ancient. There is no shame in imitation and adaptation. Simply let there be no cheap imitations in narrowness and folly, let there be bold imitations in a stupendous work of art, the product of burning faith in the glory of God and goodwill to mankind. As Emerson says :

“Every book is a quotation , and every house is a quotation out of all forests, mines and stone quarries , and every man is a quotation from all his ancestor-. And this grasping inventor puts all nations under contribution”,—let us be

that inventor to invent the future constitution of Pakistan

After a thousand years man will read the history of our endeavours and achievements, as we are reading that of our ancestors. Let it not be said then that we left the history

of the evolution of human civilization where we began. Whether we shall be able to establish the true Islamic State or not will be judged by posterity. If we can, we are sure to leave deep impressions of our feet in the sands of time. If not, we are bound to go the path of ruin and revolution sooner or later. Nothing on this earth is permanent, nothing would endure for ever. But if we can follow the main principles of Islam in our Constitution and assure the common man of his fundamental Rights of Peace, Equality and Justice, and if the State of Pakistan can enforce those rights between man and man in his ordinary life so far as humanly possible, we shall have surely the opportunity to advance true Democracy far beyond the limits envisaged by the political philosophers of to-day.

CHAPTER I

PREAMBLE TO THE CONSTITUTION OF PAKISTAN.

"La ikraha fiddene
Quad tabayyanar Rushdo minal ghayye".

—Quaran, S. II, 256.

"Let there be no compulsion in religion
(for) Truth stands out clear from error."

The objectives Resolution, embodying the main principles on which the constitution of Pakistan, is to be based, was moved before the Constituent Assembly of Pakistan on the 7th March, 1949 and passed by that August Assembly was as follows:—

"In the name of Allah, the Beneficient,
the Merciful."

- (1) Whereas sovereignty over the entire universe belongs to God Almighty alone and the authority which He has delegated to the State of Pakistan through its people for being exercised within the limits prescribed by Him is a sacred trust,
- (2) This Constituent Assembly representing the people of Pakistan resolves to frame a Constitution for the sovereign independent State of Pakistan;
- (3) Wherein the State shall exercise its powers

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and authority through the chosen representatives of the people ;

- (4) Wherein the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be fully observed ;
- (5) Wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accord with the teachings and requirements of Islam as set out in the Holy Quoran and the Sunna ;
- (6) Wherein adequate provision shall be made for the minorities freely to profess and practise their religions and develop their cultures ;
- (7) Whereby the territories now included in or in accession with Pakistan and such other territories as may hereafter be included in or accede to Pakistan shall form a federation wherein the units will be autonomous with such boundaries and limitations on their powers and authority as may be prescribed ;
- (8) Wherein shall be guaranteed fundamental rights including equality of status, of opportunity and before law, social, economic and political justice and freedom of thought, expression, belief, faith

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worship and association, subject to law and public morality ;

- (9) Wherein adequate provision shall be made to safeguard the legitimate interests of minorities and backward and depressed classes ;
- (10) Wherein the independence of the Judiciary shall be fully secured;
- (11) Wherein the integrity of the territories of the federation, its independence and all its rights including its sovereign rights on land, sea and air shall be safeguarded ;
- (12) So that the people of Pakistan may prosper and attain their rightful and honoured place amongst the nations of the world and make their full contribution towards international peace and progress and happiness of humanity."

This Preamble to the intended Constitution of Pakistan is a document and charter of Human Rights never excelled in the annals of the world in any existing constitution. The dream of centuries of the political philosophers and the tested rules of governmental propriety have been carefully and sympathetically interwoven into this sublime document. The critics of this Preamble have mostly come out with their blind prejudices against it than

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with any reasoned set of alternative proposals based on any higher juridical conception of the Rights of Man or nobler theorems of human salvation. In a world obsessed with the ideas of class struggle, elimination of man by man and state by state in a mob struggle for existence, in a world where while proclaiming the dignity of common man, he is being constantly charioted to the wheels of the gigantic machinery of the state for grinding other men, other groups and other states and thus procuring happiness out of misery, plenty out of robbery and power out of poverty and plainly proclaiming the superiority of mammon over God, this Historic Preamble, proclaiming the sovereignty of the world to God alone, and deriving the State sovereignty from Him through the people of Pakistan and thus by implication recognizing the derived sovereignty of other people and other states under the supreme sovereignty of one God, the creator of the universe, clearly, unequivocally and definitely expostulates the nature of State, Political and Legal, as a limited one, limited by God in his infinite Wisdom, and placed in the hands of the State through its people as a sacred trust, and in case of betrayal of this trust to be naturally and inevitably withdrawn by Him as He has done ever before.

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"Hath not the story reached them
Of those before them?
The people of Noah, and Ad, and Thamud;
The people of Abraham, the men of Midian
And the cities overthrown.
To them came their apostles with clear signs.
It is not God who wrongs them,
But they wrong their own souls."

Quoran, S. IX 70. (Yusuf Ali).

The above immortal lines of the Holy Quoran clearly reveals how wealth, power and sovereignty have been entrusted by God to many cities, States and Empires before, but how the sacred Trusts have been wantonly betrayed, resulting in the decline and fall of Empires and States. The power of wealth and arms which was bestowed by God for protecting the weak, succouring the indigent and doing justice between man and man was utilised for aggrandising the Rich, fleecing the poor and wreaking injustice upon the suppliant with the result that the house built upon the betrayal of the sacred divine Trust by mighty emperors, kings and conquerors toppled down at the slightest approach of organized protest which is ingrained in human nature as a last resort to escape tyranny.

Volumes of abstract philosophy can hardly maintain the Rights of the minorities or even of the Majorities from the onslaught of avarice

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of the stronger unless the power of the stronger is thus deemed to be derived as a divine Trust from God, exercised as such by the authorities, and jealously enforced by an independent Judiciary to which the meanest of the subjects of the State have got an equal access with the highest dignitaries. That is why the principles of democracy, freedom, equality, tolerance and social justice as set forth and declared in the Preamble in paragraph 4 are deemed to follow from the nature of the sacred Trust of the limited sovereignty of the people to be exercised by the state as enunciated in paragraph 1 are to be guaranteed and enforced by the Judiciary whose independence is intended to be fully secured in paragraph 10 of the Preamble.

The sacred Trust thus derived from the Almighty God must be exercised through an appropriate machinery; and it is in the fitness of things that the people who are the ultimate repositories of the power which God has been pleased to bestow on man should be exercised by themselves for themselves. But barring in very small city States where every man is known to every other man and has every opportunity of discussing the details of administration with his fellow man, the people as a whole cannot exercise the authority of the state. Hence in the present day

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national states with huge territories separated from each others by mountains and seas, the only conceivable way of the exercise of the sovereign powers of the state is through the chosen representatives of the people. This principle of representative form of Government rightly obtains in practically all the civilized States of the world to-day and this beneficial and only advisable form of popular government has been enunciated in paragraph-3 of the Preamble.

In paragraph-4 has been guaranteed the eternal principles of democracy, freedom, equality, tolerance and social justice without which no state has the right to exist and no constitution the right to be termed as such.

Paragraphs 5 and 6 are mutually complimentary whereas and in the former the Muslims are guaranteed the right to their own religion, culture and civilization, in the latter similar rights are equally assured and guaranteed to the minorities.

Paragraph-7 declares that the organization of the state of Pakistan shall be of the federal type which in the only conceivable type of Government for Pakistan. The unitary system has now-a-days little application except in small states which have a homogeneous territory and population with practically little or no local patriotism or interests. For Pakistan the Federal type is the only and the ideal type of structure

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that is possible and prudent to desire. Paragraph 8 lays down the fundamental rights of man which are necessary to be guaranteed to every subject of the State so that he can attain his best self. The idea of the Fundamental Rights have varied from age to age and those cherished most of all by the modern philosophers have rightly been included in the list.

Paragraph-9 specially lays down the principle of safeguarding the interests of the minorities and backward communities and together with paragraph-6 completes the charter of the Rights of the minority and backward communities in Pakistan. While the history of the world is replete with examples of the persecution of minorities and to some extent their complete and utter extermination, Islam never countenanced such treatment even in the worst days of the bigoted princes. History has shown how the Jewish Question was solved in enlightened Europe by a total annihilation or banishment of the race who were perpetually on the move in quest of a home. Christian Europe treated the Jewish minority as the cause of all human miseries and history records in letters of fire how, infuriated mobs burnt and annihilated Jews by hundreds of thousands "in the belief that the disease of Plague was a malignant device of the semetic race for the confusion

of the catholic creed."¹. The tragic outbreak of plague in western Europe about the year 1347, immortalised by the facile pen of Boccaccio in his Decameron, which is now nothing but ancient fable, showed how the minority was being treated in the Christian countries when "no western Jew was safe from the fury of Catholic mobs."

The Jewish question did not improve at all after the time of Boccaccio. Scott in his famous Ivanhoe depicts the fate of a Jew in more recent times when the mildest appellation of the Jew was "the dog". The hatred which was latent in the minds of all Christians found vent in the actions of Hitler when all the economic, social and political evils of Europe were again traced to the unhappy Jew and the whole world conspired to drive them away from God's earth back into the Arab world and disguised its black revenge into the sweet-scented wordings of a "Jewish National Home." This treatment of the minority question is in remarkable contrast with how the same question was solved by the Muslims after the advent of Islam. The policy of toleration, justice and humanity that was preached by the Holy Prophet Mohammad towards Jews and Christians alike was largely attributed by Historian Fisher

¹ Fisher History of Europe p. 319

and other celebrated writers for the extraordinary success and spread of Islam into the uttermost parts of the earth, and while Europe was sunk in darkness and barbarism this spirit of toleration and love gave to Islam the intellectual and moral leadership of the world. Even the bigoted anti-Islamic H. G. Wells had to admit in his Outline of History of the world,² that even the Christians were given every consideration that they desired. All Christian churches and all the relics were not only tolerated but the Christians were given full liberty to maintain their religion and culture.

This spirit of love, toleration and protection of the minorities has been fully and adequately laid down in the Preamble to the constitution of Pakistan. In fact it is no new declaration. The declaration is as old as the Quoran itself in which it was emphatically declared ;

“Lakum Dinokum walea Din.”

“To you be your religion

And to me mine.”

As a matter of fact the Quoran itself is the greatest safeguard of the minorities if they care to study its immortal prescriptions. The protection of the weak, the downtrodden, the minor and the minority is the first charge

2. H. G. Wells : Outlines of History, P, 616.

upon all Muslims and upon all the Islamic States. Many celebrated philosophers and historians who have studied the Quoran, inspite of all their love of their own religions could only marvel at the benign teachings of the Quoran. The destiny of man as envisaged in the Quoran is not for piling up pleasure after pleasure in this world -so as to deprive others of the same. The Quoranic destiny of man is to prepare himself for the glory of spiritual repasts, the pleasure of which would vary in the inverse ratio to the pleasures of this life. As that great Englishman, Carlyle puts it in his own inimitable language "He (Mohammad) does not like a Bentham, a Paley, take Right and Wrong, and calculate the profit and loss, ultimate pleasure of the one and of the other; and summing all up by addition and subtraction into a net result, ask you, whether on the whole the Right does not preponderate considerably? No; it is not better to do the one than the other; the one is to the other as life is to death,— as Heaven is to Hell. The one must in nowise be done, the other in nowise left undone. You shall not measure them; they are incommensurable: the one is death eternal to a man, the other is life eternal. Benthamite Utility, virtue by Profit and Loss: reducing this God's world to a dead brute steam-engine, the infinite celestial soul of Man to a kind of Hay-balance for

weighing hay and thistles on, pleasure and pains on:—If you ask me which gives, Mahomet or they, the beggarlier and falser view of Man and his Destinies in this universe, I will answer, it is not Mahomet."³

In fact no critic has dared bring any charge against the Preamble on any specific grounds. Their criticisms are born of fear complex. Many intelligent and well-educated gentlemen are aggrieved that Pakistan is intended to be an Islamic State and not a so-called secular State. Not that they are afraid of any of the teachings of the Quoran or of any principles of policy as laid down in the same. They can not produce any sura, any ayat, any paragraph of the Quoran saying that an Islamic State would do them harm on account of the principles laid down in them. They are simply afraid. They want a secular State. The secularity which has been exposed by Carlyle in the lines quoted above and all the philosophers of the East. Was there a philosopher ever born in the East, be he a Hindu, Muslim, Buddhist or Jain or of any other denomination, who espoused and preached secularism? What is more abiding than religion, than faith in the divine destiny of man? But it is possible to hide many ugly prejudices behind the screen

3. Carlyle: Heroes and Hero Worship,

of secularism. It is possible to hide tyranny, orthodoxy, genocide and the like behind the nonchalance of state secularism, thus pretending that the state does not lean towards any particular religion and neither gives special protection to any, although ninety percent of the population and hundred percent of its officials may belong to a militant type of a particular religion. But a fact is better than a hundred texts, and the helplessness of a minority, on its knees before the majority for a sweet word or a kind glance can hardly be removed by the assurance that however much they may be persecuted, tormented and pursued by the dominant majority, the state would remain a non-partisan secular state. In fact it is the height of cowardice and infamy and the state would be guilty of the breach of divine Trust if it does not declare itself and its real character in unequivocal terms.

The criticism of the Preamble that is generally advanced is that in an Islamic state the minorities would have no chance to be the top-dogs, to be chosen as Rulers and Generals, that in fact they would have to be satisfied with the lot of hewers of wood and drawers of water. This criticism betrays not only colossal ignorance of history but also the desire of deliberate blackmail. The reigns of the Muslim emperors of India for long seven hundred years, which

was not actually ideal Islamic state, would give a complete answer of the charge. This criticism can with greater justice be applied to other systems of governments in other States, where minorities have been hounded out, terrorised, persecuted and exterminated by the ruthless hands of mob violence and governmental machinery. The end of 700 year rule of Muslims in India found all the kingdoms and principalities in the hands of Hindu Rajahs under the nominal suzerainty of the Emperor. Under the patronage of the Muslim kings and emperors their best generals like Rajah Mansingh, Maharajah Joysingh, administrators like Tadar Mull, and Maharaja Rajballav, the first Ray Rayan of Bengal, Behar and Orissa, artists like Tansen, poets like Jaydev, Tulsidas, the greatest man of his age in India, as styled by the Historian of Akbar^{3a}, Chandidas, Mira Bai and Sura Dās, the blind bard of Agra, religious reformers like Ramanuja Nanska, Chaitanya, Kavir and Ramananda flourished whose fames are still unrivalled in the annals of India. The vast amount of valuable lands alone which were given as Jaigirs by the Muslim princes to Hindu savants and saints for the preservation of culture and religion are still elaborately recorded in the annals of the cadastral survey

3a V. A. Smith : Akbar, the Great Moghul, p. 417.

of India, under the name of Lakheraj, Bromoctor, Debottor and of diverse other types, described in the Amini Report of the Government of Bengal dated 3rd April, 1778, to Warren Hastings, the then Governor General of India. "The lands exempted from the payment of revenue by firmans of emperors are called Aini. Beneficiencies of this nature have been made by zamindars to a much larger extent and under so many names and pretences that it is difficult to enumerate them. They have been bestowed chiefly for the support of Brahmins, Priests and Hindoo temples or for other religious purposes," (Land Revenue History of Bengal—Ramsbotham, p. 106-107.) These valuable gifts by the sovereign to the subjects of an alien race, nationality and culture were certainly not meant to turn them into hewers of wood and drawers of water. Under the Muslim Rule in India she was known as the Paradise of the East. Under Islamic dispensation similar if not more brilliant became the condition of the Europeans. As the Historian Fisher puts it:—"For more than two hundred and fifty years the emirs and caliphs of the Umayyad house administered, from their populous capital of Cordova, a state which appreciated the values and possessed the luxuries of civilized life. The visitor to Cordova in the tenth century travelled through

a land which bore abundant signs of the supervision of an improving Government concerned to promote the interests of agriculture, trade and industry. He found peasants tilling rice and sugar cane in fields which had been irrigated by Arab engineers, mechanics working delicately in glass, ivory and leather and scribes who had discarded parchment for paper. Entering the capital, he marvelled at the oriental eccentricity which required nine hundred public baths for the refreshment of the body and four hundred mosques for the elevation of the soul. The streets were paved with stone, fountains sparkled in arcade Courts, and hundreds of lamps, many of them of silver, illumined the columns of marble and jasper which sustained the greatest of the Moslem temples. Nor were these amenities, the jealously guarded monopoly of the Arabian conquerors. Among the subjects of the Caliphs were numerous christian communities belonging to the conquered race who were permitted on payment of a tribute to multiply and prosper under the crescent. The Mozarabs formed an important part of the general community and together with the Jews constituted the principal channel through which the culture and knowledge of Arabia and Greece percolated to the Latin world."⁴.

The constitution as envisaged in the preamble

4. Fisher: *Ibid*, p, 365.

would not be of the types of Muslim empires that have passed away. They were at best despotisms, in which the Ruling despots and their ministers were Muslims and the influence of Islam had only limited effect upon their administration. What is envisaged now is a full-fledged Islamic State in which the examples of the prophet and the 4 Caliphs immediately succeeding him would be followed as ideals and in which a thorough and scientific application of the Quoranic teachings would be enforced in the relationships between man and man as in all other human transactions by the independent Judiciary and enforced by the God-fearing Executive, in case of whose incompetence the Legislature would have the effective power of guidance and control.

From the beginning of human civilization the development of civil Society have inevitably taken the same contours in all ages and climes so that wealth, power and dominion have concentrated into the hands of only a few persons whereas the mass of people have remained like dumb-driven cattle, playthings of Lords, Princes and Emperors, oppressed by ravages of war, taxation, plunder, poverty, ignorance and disease serving only to feed the insolence, pride and avarice of the rich, powerful, obstinate Lords of the realm and their satellites of a lesser degree. When the world was tired of

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such oppression mounting to the zenith, Religions came to the weary world to bring new faith and new hopes to mankind. Christianity by rendering unto Caesar what was due unto Caesar and rendering unto God what was due unto God tried to bring a truce between the rival claims of God and Mammon. Christianity had its own beauties and its own solutions. But Islam came with a different, clear-cut remedy. Islam wanted no truce with mammon. Caesar had no position or place in the Islamic dispensation and the question of minorities did not simply exist. The Islamic conception of a civil society is one in which all men are brothers, neighbours are all kinsmen, compassion for the poor, the needy, the wayfarer the first article of faith and regular charity towards the poor one of the fundamental prerequisites of salvation of the soul. Even no unkind word, not even for preaching religion, is to be tolerated in an Islamic society.

The life of this world
Is alluring to those, who reject faith,
And they scoff at those
Who believe.
But the righteous will be above them,
On the day of Resurrection,⁵

Fair in the eyes of men
Is the love of things they covet ;
Women and sons ;
Heaped-up hoards
Of Gold and silver ;
Horses branded (for blood and excellence);
And wealth of cattle
And well-tilled land.
Such are the possessions
Of this world's life ,
But in nearness to God
Is the best of the goals
(To return to.).^a.

Say : Shall I give you
Glad tidings of things
Far better than those ?
For the righteous are Gardens
In Nearness to their Lord,
With rivers flowing beneath
Therein their eternal home ;
With Companions pure and holy ;
And the good pleasure of God
For in God's sight are (all) his servants —.

Let not their wealth
Nor their sons
Dazzle thee :
In reality God's plan is

To punish them
 With these things in This life,
 And that their souls may perish
 In their (very) denial of God.⁷

These beautiful lines which in Arabic would flow like molten music, ennobling the sense and exhilarating the intellect, can in a foreign language hardly portend to a great extent the nature of the ultimate values in an Islamic State. The nature of such a State cannot and should not be judged by the follies, bigotries or oppressions of ancient Muslim kings or Emperors. Kingship or Imperialism in itself is foreign to Islam. A true Islamic polity would be the finest type of democracy and Democracy in the words of Delisle Burns "is yet to exist,"

A more serious criticism that has been levelled against the Preamble is that it tends to the establishment of a Theocracy. As a matter of fact those who advance this solemn criticism hardly know what Theocracy means. Sidgwick has defined Theocracy "to imply a social organisation in which the persons who assume a special intimacy with heaven, a special acquaintance with the Divine will, are organised in a professional body specially devoted to their religious calling and for the most part distinct and separate

7. Ibid : S IX : 55

from the ordinary secular Government; then proportion as this separate body acquires power in secular affairs, the government tends to have a distinctly and preponderantly theocratic character, and when this ecclesiastical body has obtained supreme control, we have theocracy complete."8. In other words when a special class of ordained priests claiming exclusive intimacy with the heavens and divine will, in addition to controlling all religious matters exclusively amongst themselves, dictates over the usual governmental machinery of the state as well, uninterfered by any popular will or suffrage of the general mass of the people, we may classify the society over which they hold their sway, a Theocracy. This analysis would at once put an end to all sorts of wild theories that the Islamic State is necessarily a theocracy. It is known to everybody that in Islam there is no room for priesthood, no special intimacy with heaven reserved for any, no special preponderance of one over the rest of the multitude. It is rather the negation of theocracy in which every man has the right to be the equal of the Caliph or Head of the state, in every social and religious function and the right to study for himself the holy scripture, be his own priest and rise to the greatest offices of the State. In Islam there

is no mystery, no secret anointations, no relics or formulæ to be handed down from priest to priest, no special hierarchy through which man must travel to approach divinity. Even the virulent Christian Critic of our Holy Prophet like H. G. Wells⁹ admits that Islam was free from any kind of superstition or enchantment. We shall close this chapter with the clear and unequivocal testimony of two celebrated British and American authors and commentators which would establish beyond doubt that Islam, of all religions of the world is one, in which love of mankind and devotion to duty is the only passport to salvation, without the intervention of a single priest between man and his Maker, and all criticism of the same that its influence would tend to establish a Theocracy is nothing but pitiful ignorance of envy and suspicion. As H. G. Wells says: "The insistence upon kindness and consideration in the daily life is one of the main virtues of Islam but it is not the only one. Equally important is the uncompromising monotheism, void of any Jewish exclusiveness, which is sustained by the Koran. Islam from the outset was fairly proof against the theological elaborations that have perplexed and divided Christianity and smothered the spirit of Jesus. * * * All sacrifice was barred

9. H. G. Wells : *Ibid*, p. 611-612.

the faithful ; no loophole was left for the official priest of the old dispensation to slip back into the new faith. It was not only a new faith, a purely prophetic religion, the religion of Jesus was in the time of Jesus, or the religion of Gautama in the life-time of Gautama, but it was so stated as to remain so. Islam to this day has learned doctors, teachers, and preachers ; but it has no priests. 'It was full of the spirit of kindness, generosity and brother-hood ; it was a simple and understandable religion ; it was instinctive with the chivalrous sentiment of the desert ; and it made its appeal straight to the commonest instincts in the composition of ordinary men. Against it were pitted Judaism, which had made a racial hoard of God ; Christianity, talking and preaching endlessly now of trinities, doctrines and heresies no ordinary man could make head or tail of ; and Mazdaism, the cult of the Zoroastrian Magi, who had inspired the crucifixion of Mani.

* * what appealed to them was that this God, Allah, he preached, was by the best of the conscience in their hearts a God of righteousness. And that the honest acceptance of his doctrine and method opened the door wide, in a world of uncertainty and intolerable divisions, to a great and increasing brother-hood of trustworthy men on earth, and to a paradise not

of perpetual exercise in praise and worships in which saints, priests, and anointed kings were still to have the upper places, but of equal fellowship and simple and understandable delights. Without any ambiguous symbolism, without any darkening of altars or chanting of priests, Mohammad had brought home those attractive doctrines to the hearts of Mankind".¹⁰. Hitty, the American Historian of Arab civilization has clarified the matter further in his monumental work. As he emphasizes, "We should here guard against the common fallacy that the Caliphate was a religious office. In this regard analogies drawn from the headship of the Holy Roman Empire and from the modern Christian distinction between the spheres of temporal and religious powers are misleading. As Amir-ul-Mu'minin, Commander of the believers, the military office of the Caliph (Commander-in-chief) was emphasized. As Imam (leader in public prayers) the Caliph could and did lead the religious service and pronounce the Friday Khutbah (Sermon); but this was a function which the humblest of the Muslims could perform. Succession to Muhammad (Khalifat) meant succession to the sovereignty of the State. Muhammad as a prophet, as an instrument of revelation, as a Messenger of Allah (Rasul), could have no

10. H. G. Wells : Ibid, p. 612.

ccessor. The Caliph's relation to religion
 as merely that of a guardian. He defended
 the faith, just as any European emperor was
 supposed to do¹¹. (The Title of the present
 King of England, a Theocracy by no stretch
 of imagination, is, The Defender of the faith).
 "Not until the latter part of the 18th Century
 did the notion prevail in Europe that the
 Moslem Caliph was a kind of Pope with
 spiritual Jurisdiction over the followers of
 Muhammad throughout the world. In his *Tabban*
général de L'empire ottoman (Paris, 1788),
 'Ohsson, a Constantinople Armenian was one
 of the first to give currency to this fallacy¹².
 The blind critics of the Pakistan constitution
 have made this unhistorical fallacy the sheet-
 anchor of their case, which has thus no legs
 to stand upon.

11. Hitti : *History of the Arabs*, p. 185-186.

12. Hitti : *Ibid.* p. 186

CHAPTER II

FUNDAMENTAL LAWS OF PAKISTAN.

"It is He who hath made you
(His) Agents, inheritors of the earth :
He hath raised you in ranks, some above others :
That He may try you
In the gifts He hath given you :
For thy Lord is quick in punishment :
Yet He is indeed Oft-forgiving
Most Merciful".

S. VI. 165 (Yusuf Ali).

Modern Jurists have defined Law as "a general rule of external human action, enforced by a sovereign political authority".¹³. The sovereign political authority lays down certain rules for the guidance of the external actions of its subjects and enforces the same through the 'sanction'. This definition gives us only the form of Law but not its nature and contents. In fact as Woodrow Wilson has succinctly put it, Law is not only an active guiding force, the expression of the Will of the State, but what is more important to the Philosopher of the State, it is the mirror of the conceptions of the society existing at a particular age. "Looked at from an abstract point of

13. Holland : Elements of Jurisprudence, p. 4

w, Law is a body of principles, and as such constitutes a mirror of the prevalent conceptions to ethical standards and social relationships the communities in which it is accepted".¹⁴. The history of the gradual awakening of man conscience, morality and ethical rules, inseparably connected with the development the conception of Law. The clash of interests between man and man, group and group, when they became organized in civil societies, call not for arbitrary arbitration of the sword, the stronger getting the best of the weaker, but arbitration based upon the merits of the adverse claims which was given the name of justice. The word "Themis" in the language of ancient Greece of Homeric times meant the Goddess of Justice, from whom the king, as the divine agent derived authority of his pronouncements by direct inspiration. Abstract justice was in those days unknown and could not command the respect and obedience of the contending parties unless connected with the Goddess of Justice by way of inspiration. The peculiarity of the conception is brought out by the use of the plural. Themistes, (Themises), the plural of Themis, are the awards themselves, divinely dictated to the Judge. Kings are spoken of as if they had a store of "Themistes" ready to hand for use; but it

14. Woodrow Wilson: The State p. 276.

must be distinctly understood that they are not laws, but Judgments. 'Zeus or the human king on earth', says Mr. Grote, in his history of Greece 'is not a law-maker, but a Judge'. He is provided with Themistes, but consistently with the belief in their emanation from above, they cannot be supposed to be connected by any thread of principle; they are separate, isolated judgments".¹⁵. Thus we see that the notion of Justice was not connected with any principles of morality in Homeric times although the shrewd kings of those times had to decide the cases and pronounce their judgments in accordance with some sort of rough and ready principle of Right and Wrong, so that they might sufficiently inspire confidence as divine inspiration.

In the infancy of civilization Law was pre-eminently Judge-made law, a series of adjudications in similar cases and gradually only the aristocracy directly connected with the king or Priest as the Divine Lawgiver became the universally recognized ultimate repositories and administrators of law. Law was not then a published set of Rules of external human conduct, but precedents enunciated in Judgments handed down from generation to generation consolidated into the customs or the customary Laws. The Brahminical Priests of the East and the Oligarchy

15. H. J. S. Maine : Ancient Law, p. 2-3.

Priests of Rome were all repositories of legal lore. The institutes of Manu in India and the twelve Tables of Rome are some of the first codified Laws of humanity to give precision and uniformity to law and to protect it from the frauds of the privileged oligarchy of priests.

While the development of the conceptions of Law practically stopped in India with Manu, it had further development in the west through the development of a theory of Law of Nature and Principles of Equity. Nature, the beneficent and supreme, the beneficial, was supposed to favour nobody specially but every body equally before the biologists introduced the idea of the survival of the fittest. All that was good and beautiful was identified with Nature and it led to the corollary that Nature has given the same to all men and all nations the same advantages and disadvantages but man by his inequity has set at naught the desires of Nature and defeated her intentions. "To live according to Nature came to be considered as the end for which man was created and which the best men were bound to compass. To live according to Nature was to rise above the disorderly habits and gross indulgences of the vulgar, to higher laws of action, which nothing but self-denial and self-command would enable the aspirant to observe. Live according to nature was

the sum of the tenets of the famous stoic philosophy".¹⁶.

This conception of Nature as the sumtotal of all that is good and beautiful, higher and nobler aspects of life, allured and charmed the Juristic Philosophers who gradually expounded the theory that the codified Law was always to be superseded in favour of the Law of Nature whenever there was any harshness or injustice palpably manifest and this theory was the mother of Equity. And as Nature was common to all nations and races on the earth, the Law of Nature was confounded with law of Nations or Jus Gentium of the philosophers of the Middle Age.

It is thus clear that the awakening of the moral conscience of mankind, the evolution of moral ideas to change the settled Law took this devious process and gave rise to the legal conception of Equity of modern times. In essence Law represents the morality of the past centuries, Equity that of the present, so that with the advance of moral ideas of the human race, past morality must give way to present morality and thus Law changed by Equity, which was nothing but a "system founded on moral rules".¹⁷. of the present, Jellinek defined Law as 'minimum ethics,

16. Ibid : p, 32.

17. Ibid : p, 40.

that is to say, the whole combined requirements of morals, whose observance, at a given stage of social development, is absolutely indispensable. All moral requirements beyond this indispensable minimum constitute morals in the strict sense as distinguished from law. And in every progressive society moral notions progress faster and develop quicker than law. The latter presents, then, a lower step in development, a step which morals have already taken. The separation of law and morals are not constant and change in proportion to the number of moral rules recognized by everybody. We always expect that in the most advanced phases of social development interpenetration of law by morals will become more and more closer and intimate".¹⁸.

We have already seen how the Jurists of our day have defined Law as —

1. A Command.
2. A general as opposed to a particular command
- 3 The command is from the Sovereign to the subject
- 4 The command is attended with a sanction.

Now moral rules existing in the mind of the ages and seers cannot fulfil any of the conditions set forth above. However enthralling and

capuring the imagination of man, morality has neither any forum from which to be declared nor any machinery by which to be enforced. Social approbation or disapprobation cannot secure the purpose of guiding the multitude and unless moral rules emanating from the conscience of mankind are incorporated effectively and quickly by the state into the body of laws social progress is bound to be halted and made stagnant in the pools of time.

Legislation was devised as the method to secure the desideratum. Legislation thus does not and cannot introduce strange laws and manners foreign to the genius and judgment of a people. It merely gives the declaratory and binding force to a set of moral principles that have already gained credit in the conscience of mankind. And once legislation is adopted as the normal channel of expression of the social conscience as to matters of Right and Wrong, the salutary principle that Equity cannot override statute becomes the guiding principle of the court of Law administering Justice to the people.

The conception of the fundamental Rights of man is but another side of the same picture of the evolution of the social conscience. In essence there is no distinction between Fundamental laws and other laws. - Except International Law, which cannot be called Law

properly so called, and which has been aptly described by Holland as the "Vanishing point of Jurisprudence"¹⁹ all laws properly so-called are of one and the same type. But to all students of political history, Fundamental Rights and Fundamental Laws have an interest and importance of their own. At different times in human history the mass of people suffering from different sets or man-made calamities presented demands for the guarantee of a particular set of human Rights, which the government of the times must consider inviolate. In other words the demands set a limitation upon the legislative or sovereign powers of the State to protect the poor, unorganized, battered mass of people who are not always capable of securing justice against governmental injustice and State Tyranny. From the conception of the State of Nature came the Laws of Nature and Natural Rights were thought to be those human rights which were decreed by the immutable laws of nature and principles of rationality which were considered to be the manifestation of the will of Nature. Nature thus being identified with abstract rationality and goodness, man oppressed by bad governments and despotic princes demanded their 'Natural Rights' which they considered their

19. Holland: *ib id.* p. 372.

inherent rights. "Man is born free and everywhere he is in chains",²⁰ said Rousseau, labouring under the same conception and implied that it is the natural right of man to be free and he has been unnaturally put into the shackles of a political society.

Thus whenever man was oppressed, whenever man was put to disabilities under the authority of the State, the conscience of man revolted against such tyrannies in every age and escaped through the flood-gates of revolution to remove the chains. First came the revolution in ideas and then revolution in politics. And in this revolution of ideas the concept of the Law of Nature and Natural Rights played a historical part in the middle ages and after. As Sidgwick puts it "the notion of a law of nature and natural rights belonging to man as man, and of higher validity than the laws and legal rights which any particular state may have determined for itself—though only of jural importance to the Romans, becomes of far wider political importance in modern history. It becomes, in fact, an important factor in the movement of thought which leads ultimately to the French Revolution, for the principles that 'men are by nature free' and 'men are by nature equal' are principles of this *Jus Naturale*"²¹.

20. Rousseau : [Everyman] : *Contract Social*, I, i.

21. Sidgwick : *Ibid*, p, 182.

It will be observed by all students of political philosophy that these notions are nothing but the different shapes and manifestation of the gradual unfolding of the human conscience through the formulations of moral conceptions of mankind. This moral awakening warned the state again and again as T. H. Green puts it, that "will and not force is the basis of the State"²² and Nature had given man the Right to Revolt if the State did not respect the inherent natural rights of man. Maine puts the thing in a nutshell by saying "the vast mass of influences, which we may call for shortness moral, perpetually shapes, limits, or forbids the actual direction of the forces of society by its sovereign"²³.

No man in the present world can be so foolhardy as to claim another man as his slave. Yet the institution of slavery is as old as Humanity itself and it took thousands of years to liberate humanity from the shackles of slavery by way of a long and devious process. Philosophers like Socrates, Plato and Aristotle considered slavery to be an institution of nature. A slave was considered to be a "Res" (thing) and not a 'persona' (person) and a free man could acquire, transfer and

22. T. H. Green, *Principles of Political Obligation* ch-G

23. H. S. Maine, *Early History of Institutions* p 357

bequeath the usufruct (i. e. the right of enjoying the labour) of the slave just as much he could do that of ordinary cattle and the like. In Roman Law. "A slave was considered a homo (an individual) without persona (personality) and as such was relegated to the category of res (things)".²⁴.

In Germanic Law slavery was tolerated but with a distinction. The Germans considered "that all slavery had arisen from compulsion, capture and unjust force, and that what was now given out as right was only custom, ancient but unjust"²⁵. With the rise of christianity and Islam, the intellectual basis of slavery was completely destroyed and that which could not excite the pity of a Plato or Aristotle was now considered to be wrong, unjust and perverse in the conscience of the ordinary man due to the progressive spirit of humanity. The English Law of August 28, 1838 (3 and 4 Gul. IV. 73) finally regulated the emancipation of slaves and declared every slave free who came to Great Britain or Ireland with his master's consent. In Russia Czar Alexander II, by the law of February 19, 1861, carried out the work of emancipation inspite of the strong resistance of the Nobles. Thanks to the zeal and humanity of Wilberforce,

24. Bagchi : Roman Private Law, p, 34.

25. Bluntschli : The Theory of the State, p, 175.

Clarkson, Macaulay, Stephen and others that the whole world stood against slavery by this time. America abolished slavery by the Constitutional Amendment of Dec. 18, 1865 and Brazil did the same by the law of September 28, 1871. "The Brussels conference of 1889, convoked by King Leopold of Belgium on the suggestion of the British Government and attended by the representatives of seventeen States, resulted in an act (ratified in 1892) which has been termed the Magna Carta of the African slave, so complete and far-reaching were the provisions which the participating states, which included Persia, Zanzibar, and the Turkish Empire, bound themselves to adopt. Yet still the evil persists, and still the European crusade proceeds, but now with an ever augmenting promise of success, against the eternal cupidity and cruelty of man"²⁶.

It will thus be seen that the fundamental Right of Man to equality and freedom had a long and arduous battle, the last death struggle of which is not yet over. Yet the human conscience, the evergrowing human morality, through religious scriptures, through poetry and art, through the philosophy of a Law of Nature have been struggling for the emancipation of man for a long period in history. And a state which cannot guarantee this fundamental

Right of Freedom and Equality of status to every man on its soil, hardly deserves the name of a State, the appellation of an organized political society, however much powerful it may be and however far-flung may be its empire.

In the history of civilization another disability of man which has caused and is still causing the greatest hardships and misery to large masses of people is the absence of the Fundamental Right of Religion. Even amongst Christians 'inter se' religious riots and persecutions of the followers of one sect by another in Europe went on apace for a long period of time. Wars of Religion became fashionable and "armed affrays and assassinations became incidents of ordinary life"²⁷. Princes freely took the sides of the contending groups to suit the convenience. The Massacre of St. Bartholomew's Day on August 24, 1570 A. D. when the orthodox Catholics of France began the slaughter of the Huguenots, the like of which has probably not been repeated in history and even the Great Calcutta killing of August 14, 1946, paled into insignificance before the same. "The bell of the Palace of Justice rang out the signal for the slaughter to begin. Such a carnival of butchery as then ensued, not in Paris only where some three or four thousand Huguenots were killed, but throughout the provinces, outrea

27. Fisher : Ibid, P, 567.

the fiercest anticipations of the court. The Huguenots, whose trade suffered from the religious troubles, needed no incitement to massacre the Huguenots or to mutilate their corpses. They killed not the leaders only, but the rank and file, and their example was gleefully followed in the provinces. The head of Coligny was sent to the Pope, the golden rose (the head) was sent by the Pope to the king. At the news of the happy extermination of so many heretics the Pope ordered a medal to be struck and Philip of Spain commanded a Te Deum. Coligny was dead. Conde' and Henry of Navarre were in the king's hands, and thousands of Huguenot corpses attested the Catholic orthodoxy of France"²⁸.

Similar religious wars continued in Germany and Spain and the horrible practice of Inquisition was the order of the day. In Germany these struggles somewhat abated with the Peace of Augsburg on September 25, 1555, but it was not the charter of religious liberation and the principle of toleration. In Spain religious persecution became the fashion of great potentates like Charles V and they considered it a sacred debt to God and country to stamp out unbelief"²⁹. Inquisition was introduced in 1501 A. D. Protestant martyrs like De Voes

²⁸ Ib. J. I. p. 373

²⁹ Ib. J. I. p. 374

and John Eset were tied to stakes and burnt with faggots and about fifty thousand men and women perished by this violent death during the reign of Cahrles V. The sole crime of these holy zealots was that they wanted to worship God in their own way and read the scripture in their own language. "Persecuted, imprisoned, their conventicles banned, their Bibles burned, their preachers slaughtered, the Protestants of the Netherlands continued to offer a passive resistance to the Government"³⁰.

Without entering into meticulous deatils of these horrible tragedies it may be said that the settlement of Henry IV of France known as the Edict of Nantes (A. D. 1598) made a notable contribution in establishing religious toleration in central Europe. As Fisher says, it "was the first public recognition of the fact that more than one religious communion can be maintained in the same polity. Long before religious toleration was recognised in England or Germany, it was, in virtue of this famous instrument, made part of the Constitutional law of France. The strong arm of the Huguenot had extracted from his Catholic adversary concessions which no Roman would have conceded to argument"³¹. It was however Revoked in

30. Ibid : p, 531.

31. Ibid : p, 579.

1685 A. D. by Louis XIV, who by his massacres of the Huguenots drove away the most industrious and skilled of his subjects to a foreign land.

The modern religious strifes just on the eve of the transfer of power from British hands to India and Pakistan are strangely reminiscent of the wars of religion in Europe. The extermination of Jews from Hitlerite Germany of recent times is the other illustration of the same tendency. Hitler based his Programme of extermination of the Jews on the [exploded theory of the Purity of the Aryan race and superiority of the Aryan race over the other races of the world. His war on the Jews was not so much a religious war as a Racial war. It appears that his theory has died a violent death just as much as it had a violent birth: and the world has been rid of a new apple of discord for the extermination of man by man.

In the present times, very few people would seriously persist in the doctrine of one State one Religion. The world has become a very small place on account of the *scientific discoveries* of the modern era and the whole world has become interdependent to a surprising degree both in the realm of commodities and thought. Just as a shortage of wheat in Canada has immediately far flung influence upon

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all the wheat-eating countries, similarly suppression of ideas or religions in one country would have immediate and far-reaching effect not only on the neighbouring countries but also on the remotest regions. Moreover the intellectual sanction behind suppression of heresy and making any religion safe for humanity has already vanished. The world to-day is progressively a free-thinking world and all religions must stand alone for all they are worth. Their intrinsic value in obtaining the salvation of human soul and securing the spiritual progress of humanity was never more on test than at the present times and we have already seen how ideas and religions ferment more quickly under repression than otherwise. The death of a martyr stirs the whole humanity and the tyrant is the ultimate victim of his outrage. Islam did not die under the greatest repression, nor did Christianity, Buddhism or Protestantism. The universal conscience of mankind has already risen above the pettifogging jealousy of Priestcraft and the stage has definitely been set for a universal fellowship of faiths.

Islam proclaimed this universal fellowship of faiths thirteen hundred years ago, and the most beautiful and sublime logic was laid down in the Quoran for this fellowship.

“Let there be no compulsion in religion :
(For) Truth stands out clear from Error :

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The modern religious strifes just on the eve of the transfer of power from British hands to India and Pakistan are strangely reminiscent of the wars of religion in Europe. The extermination of Jews from Hitlerite Germany in recent times is the other illustration of the same tendency. Hitler based his Programme for the extermination of the Jews on the [exploited] theory of the Purity of the Aryan race and the superiority of the Aryan race over the other races of the world. His war on the Jews was not so much a religious war as a Racial war. It appears that his theory has died a violent death just as much as it had a violent birth; the world has been rid of a new apple of discord for the extermination of man by man. In the present times, very few people would willingly persist in the doctrine of one State religion. The world has become a very different place on account of the scientific discoveries of the modern era and the whole world has become interdependent to a surprising degree both in the realm of commodities and labour. Just as a shortage of wheat in Canada immediately has a strong influence upon

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For falsehood is (by its nature)
Bound to perish. ",³⁴.

History has adequately proved the truth of the above. We are now at the cross-roads of the times when either we must grant humanity the charter of freedom of religion or perish in perdition. There is no via-media. If a man is not to die unjustly either in the hands of the state or that of assassins the Fundamental Laws of all states must recognize the Right to Life and Right to Religion as much as immunity from slavery. For bodily freedom goes ill with mental slavery.

Next in point of importance to Life, Liberty and Faith comes Work and Education, the vocations of the body and the mind. The conception of the Police state, the state which does not saddle itself with the broader welfare of man but simply contents itself by deciding disputes between private individuals and preventing ordinary breaches of the peace has died a swift death with the advent of socialism. As a well-known writer on the Modern State says: "To insist on order as such is to make of the state a 'police-state', which is only removed in degree from the order of a menagerie. An order that is to serve the community must be in conformity with and limited by the ideals of the community, and particularly

34. Quoran : S XVII, 61.

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Whoever rejects Evil and believes in God
Hath grasped the most trustworthy Handhold,
That never breaks"²².

Virtue is its own reward. Truth and Virtue are bound to appear. As the insect is inevitably attracted to the fire, though she burns herself thereby, the soul of man slowly but surely marches towards truth and virtue irrespective of age or clime, although it has to pass through a thousand hells of persecution or misery.

"The desire of the moth for the star
Of the night for the morrow,
The devotion to something afar
From the sphere of our sorrow?"²³.

Religion and compulsion are by nature mutually exclusive. Religion is a matter for the soul, a question of devotion. Compulsion and force are destructive of devotion and destructive of Faith. As light and darkness are distinct realities of our physical consciousness, so are religion and unbelief distinct realities of our spiritual and moral consciousness. This idea is expressed in more sublime way in the Holy Quran, thus:

"And say: 'Truth has (now) arrived
And falsehood perished:

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the ideals which are understood by the terms justice and liberty. The true political conception of an order extends into the conception of protection. Here is an immense task for the State, quite proper to its nature and still largely unfulfilled. To protect the weak instead of the strong is on the whole a modern reinterpretation of the State's function. Such protection is gradually taking the form of the establishment of minimal standards of living, so that the mere requisites of health and decency shall not be denied by accident or misfortune or capacity, to any member of the community".²⁵ The great English Statesman Edmund Burke posed this question about 200 years ago "what the State ought to take upon itself to direct by public wisdom, and what it ought to leave, with as little interference as possible, to individual freedom"²⁶ although not yet absolutely decided by the wrangling of philosophers, has been answered in practice and almost all the states have to-day encroached upon the individual sphere of action which even the other day was considered unthinkable. Those who are ardent exponents of socialism and those who are its opponents have all alike agreed to subscribe to the new conception of the 'Positive State' and the idea of the 'Police

²⁵ *Principles of Political Economy*, p. 133-4.

²⁶ *Edmund Burke* (1764-1797) p. 134.

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taken up by the state in the very infancy of Islam and developed to a considerable extent which may be considered to be the mother of all socialistic doctrines. More than the socialistic doctrines Islam gave the Economic principle of the Zakat the greatest spiritual glory ever conceivable by philosophy and made God himself the debtor of the donor, the most beautiful loan of man giving to his Maker: Says the Quran;

Who is he that will Loan to God
A beautiful loan,
Which God will double unto his credit
And multiply many times?
It is God that giveth want or plenty
And to Him shall be your return".³⁷.

"And establish regular Prayer
And give regular charity
And loan to God a beautiful Loan
And whatever good ye send forth
For your souls
Ye shall find it in God's presence,
Yea, better and greater, in Reward".³⁸.

The institution of Zakat was systematically developed as a part of Personal Law as well as constitutional Law by the ancient Arabs. As Hitty has pointed out "Prescribed originally

37. Quran : S-II : 245.

38. Ibid : S-LXXIII : 20.

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eminded to the believers show, that Islam conceived the society as organised in the State as a full-fledged organism in which the salvation of the individual did not simply exist. Charity not in the sense of intermittent condescension to bestow a few coppers on the indigent but regular charity of the type of the modern Income Tax was made an article of faith for every Muslim and an institution of the state. You cannot attain your moral and spiritual salvation according to the Islamic dispensation despite of all your prayers and fastings in the midst of dire want and poverty all around you unless you extend your helping hand, your wealth, your services towards your suffering fellow brothers and sisters, and if you can evade the Income Tax Authorities of this world, you cannot evade the supreme Taxing authority of the world hereafter.

This conception of the Society as an Organic whole in which every man is bound to think of the poor, the infant, the neighbour, the helpless, the traveller and others unable to earn living, gave early Islam the tensile strength and formidable cohesive force which within a few years brought the great Persian and Byzantine Empires literally at the feet of the nomadic Arabs who at once became metamorphosed into intellectual leaders of the world for a hundred years. The Institution of Zakat was

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taken up by the state in the very infancy of Islam and developed to a considerable extent which may be considered to be the mother of all socialistic doctrines. More than the socialistic doctrines Islam gave the Economic principle of the Zakat the greatest spiritual glory ever conceivable by philosophy and made God himself the debtor of the donor, the most beautiful loan of man giving to his Maker : Says the Quran ;

Who is he that will Loan to God
A beautiful loan,
Which God will double unto his credit
And multiply many times ?
It is God that giveth want or plenty
And to Him shall be your return".³⁷.

"And establish regular Prayer
And give regular charity
And loan to God a beautiful Loan
And whatever good ye send forth
For your souls
Ye shall find it in God's presence,
Yea, better and greater, in Reward".³⁸.

The institution of Zakat was systematically developed as a part of Personal Law as well as constitutional Law by the ancient Arabs. As Hitty has pointed out "Prescribed originally

37. Quran : S-II : 245.

38. Ibid : S-LXXIII : 20.

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as a volutary act of love and considered almost identical with piety. Zakat evolved into an obligatory tax on property, including money, cattle, corn, fruit and merchandise. The young Islamic state collected Zakat through regular officials and administered it from a central treasury to support the poor among the community, build mosques and defray government expenses".³⁹.

In Christian Europe Poor Law legislation began in the nineteenth century with varied results. The criticisms against the system were many and for a long time virulent criticisms were brought to bear against the poor Law itself. It was stated that relief of the poor had been the cause of the ruin of the sturdy labouring classes, sapped their vitality and made them lose their national character, and gave rise to a popular refrain -

'Then drive away sorrow, and banish all care,

For the state is bound to maintain us".⁴⁰.

As a matter of fact there was much justice in this sort of criticism because the idea behind the poor Law system is not that all men should remain idle and be hangers on the numerous doles of the State thus becoming an ever-increasing pauper class in the society. This actually happened once in human history

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during the heyday of Buddhism when everybody wanted to turn the mendicant and beg for his bread and thus plod his way to salvation (Nirvana) and give up labour, the dignity of which was then at a discount as a result of the influence of theory of 'Karma' (work). "Karma, He believes in, and regards as an explanation of suffering; and when one is freed from it, one reaches Nirvana—the actionless state of donothingness—in this life, and Parinirvana, when the body—purged of all karma falls into decay. The way to reach this consummation is by the eight-fold path. Still persisting, still achieving in the eight-fold path, the Buddhist becomes free from all bodily passion and worldly desires of life and its longings; and when Nirvana is attained, he becomes finally, absolutely, completely free from any longing whether of earth or of heaven, of pride and passion and ill-feeling, self-righteousness and ignorance"⁴¹. The idea behind all legislation and relief for the poor lies in providing for minimum requirements of life for the sick, the poor, the workless labourer and provide him with work befitting his efficiency at the earliest possible time so that he may not be a drone sucking at the coffers of the state aimlessly but turn into an efficient pillar of the state and be saved from untimely,

⁴¹. K. T. Shah : The Splendour that was. 'Ind, p, 101.

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merited decay on account of disease, infirmity, fancy, poverty and analogous inevitable reasons temporary duration. The state is not merely go or watching like the disinterested spectator in a match of struggle for existence, just as much as we do in a football match, the weaker party going down at the onslaught of the stronger but it is the moral duty of the state to help the weak to attain his or her proper rank. It is high time that this moral duty should be epitomized in the Fundamental Law of every state to eliminate finally the wasting disease of unemployment and poverty from the body organic which we call the state.

The East gave the great Religions to the world, the West gave it the social sciences. While Buddha had preached the Gospel of nothingness, the philosophy of "no-work", Karl Marx in 1848 gave his Communist Manifesto to the world in which he proclaimed the universal obligation to work as one of his 10 commandments. Value in his conception was lying but labour and labour was to him ultimate reality in the world. "The utility of a thing", as he says, "makes it a use-value. This utility is not a thing of itself. Being created by the physical properties of the commodity, it has no existence apart from that commodity. A commodity, such as it is, can

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or a diamond is therefore, so far as it is a material thing, a use-value, something useful. * * * * Along with the useful qualities of the products themselves, we put out of sight both the useful character of the various kinds of labour embodied in them, and the concrete forms of that labour; there is nothing left but what is common to them all; all are reduced to one and the same sort of labour, human labour in the abstract,"⁴².

Labour according to Karl Marx was not only the ultimate reality in the productive world, the basis of all utility and surplus value but it gave direction and purpose to the very existence of man and ennobled it. It creates and stimulates human imagination and procreates civilization. "By thus acting on the external world and changing it, he at the same time changes his own nature. He develops his slumbering powers and compels them to act in obedience to his sway. * * * * *. A spider conducts operations that resemble those of a weaver, and a bee puts to shame many an architect whose difference from the best of bees is this, that the architect raises his structure in imagination before he erects it in reality. * * * Thus Nature becomes one of the organs of his activity, one that he annexes to

42, Karl Marx : Capital, p, 2-4.

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his own bodily organs, adding stature to himself in spite of the Bible. * * * Living labour must seize upon these things and rouse them from their death-sleep, change them from mere possible use-values into real and effective".⁴³. In the words of Karl Marx, all things in the world are "bathed in the fire of labour" and labour to each man is not only a sacred duty and obligation but his inherent Right which must be guaranteed and secured by the State so that he may develop his personality in the attainment of his best self. Labour has been made the basis of the Gigantic Soviet experiment in planned economy through this revolution in the conception of labour and in the words of Stalin it has brought "a radical change in man's attitude to labour from the shameful and heavy burden it was once considered to be, into a matter of Honour, a matter of Heroism, of Glory and valour".⁴⁴. The fundamental Laws of the Soviet Republic as embodied in Articles 18-133 of the Federal Constitution of the U. S. S. R. of 1936, recognize the "Right to Work" along with "Right to Rest" and "Right to Education" as inherent in the citizenship of the State and these rights are safeguarded by all the means at the command of Socialist economy. "Right to Work" is the sheet-anchor

⁴³ Ibid: p 116-121.

⁴⁴ L. A. Karval Socialist Planned Economy in the U. S. S. R. p. 100

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of the Soviet constitution around which all the five year Plans for the development of the Soviet Union revolved. Other States of the world have already undertaken a full-fledged programme for the elimination of unemployment and the mutual recrimination of socialistic and capitalistic ideas of our days does not admit of the rejection of the idea that Right to Work has already won its battle in a world divided into warring camps of differing economic allegiance.

The guarantee of a Right to work for obtaining a living, is one of the fundamental ethical bases of the State which has practically been recognized in all the civilized countries of the world. Whether the State itself is to regulate property and work or is to leave it to private enterprise, in other words, whether production and labour is to be organized on the socialistic or capitalistic basis is an entirely different question irrelevant for the purposes of this treatise. Whatever may be the method of production for the time being, the State, in the context of the modern world, if it is to look to the welfare of the entire organic whole, cannot sit idle as a mere spectator while people will go on workless begging for bread and unemployment spreading discontent and misery far and wide. If the moral development of man to his appropriate stature can

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be only guaranteed by a supply of the proper kind of work for which he is fitted by education and environment, if there is any social meaning in the dictum that the idle brain is the devil's workshop, if idleness is considered to be an individual and social disease, the state must so organize the productive machineries within its own sphere that no man is forced to go out of employment or work, and the fundamental right to work must be recognized in the fundamental laws of the state and whether practically the desired result may be obtained or not in a particular state within a particular time-limit or at a particular period of time will depend upon the genius of the people of that particular state at that particular point of time. A curious document which reveals that all notions of morality, and elevation of the ordinary man and woman to their higher destiny, depends primarily upon work and consequently proper sustenance, is given here from the experience of a high-minded social reformer who confessed "All Switzerland is now alive to the fact that if men, whether unemployed or employed, *are not to become unemployable*, they must be kept from drink; all Switzerland is alive to the fact, too, that it is hopeless work trying to keep them from drink unless

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they are properly fed".⁴⁵.

After the success of the Communist experiment of Soviet Russia, the reluctance of the capitalistic world to approve of the Right to Work as a Fundamental Law of the State, must come to an end. Soviet Russia has seriously challenged the world for a sufficiently long time and stood the test well that the planned Economy of the U. S. S. R is capable of resolving the unemployment problem by guaranteeing work to each and every man. If the rest of the states of the world cannot do the same, their system would be as vulnerable to the onslaughts of the Soviet ideas as the Roman Empire was to the onslaught of the Huns, Visigoths, Vandals and the barbarians or as both the Roman and Persian empires were vulnerable to the teachings of Islām. Actually the victory of the Soviet ideas are already on march. Communist China and Communist Eastern Europe are already accross the border and the existence of the European system of states depends a great deal upon the right approach to this subject.

Happily Islam stands on a different footing altogether. Islam is the Religion of Peace and is not going to be a party to the war of idealism between Capitalism and Communism. Islam refuses to take sides in the clewa

45. Sellers : Nineteenth Century and After, Nov

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economic interests Islam stands for justice and fairplay between the classes, and would not allow the domination of one class by another or one man by another. Islam refuses to countenance the existence of classes except the natural inequalities between man and man which arises out of personal efforts to better himself. The principles of Islam neither favour accumulation of wealth nor destitution of man and advocates an organic and balanced society where every man is morally, spiritually and economically the equal of every other man. Every good that has been found in the political or economic organizations of mankind in the different parts of the world would be readily utilised by the Islamic state for the good of mankind. The State as well as the whole world is an organic entity in the Islamic conception of things and Islam refuses to countenance the division of the world on the economic or political front on any account and would accept the best ideas of economic and political development of that State till better ideas are born. The disruption of society, the annihilation of interests, the destruction of rights is not the method of the Islamic civilization. It is the method of subordination of all social mechanisms, interests, classes, and rights to the total moral and spiritual welfare of humanity and their mutual conciliatory

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juxtaposition to avoid friction and confusion in the world that Islam has preached in the world. The clarion call of Islam, as clearly sounded in the Quoran is :

“Let there arise out of you
A band of people
Inviting to all that is good,
Enjoining what is right,
And forbidding what is wrong :

They are the ones to attain felicity”.⁴⁶.

and refusal to invite any good principles to be found either in the Capitalistic or the Communist Economy and to forbid all that is obnoxious to the peace of the commonwealth to be found in either system, would be dereliction of duty and betrayal of trust for the State, according to the dictates of Islam.

The Right to education has already been recognized to be a Fundamental Right of man in all civilized States of the modern world although not actually made effective in many countries. Education is to the mind what sustenance is to the body and the moral upliftment of society is impossible without a minimum of education. Neither democracy social nor economic democracy is possible with an uneducated ignorant people whose characters have not been formed by education and

46. Quran : S-III : 104.

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use of corporate responsibility. Social solidarity and human brotherhood can have no awakening in the minds of such a people. The action of the State is not merely to

"Meté and dole

Unequal laws unto a savage race

That hoard and feed and sleep

And know not me".⁴⁷.

As Jethro Brown has put it "The teacher in a democratic community is not merely training citizens, he is training the arbiters of national destiny,"⁴⁸ and any type of self-government is not possible without the fundamental training of the mind of the citizens to respect the laws, realize the utility and blessings of the constitution and feel the harmonizing influence of the State in setting up the conception of the General Will from the unorganized mass of contradictory human sentiments of selfish aggrandizement which Rousseau aptly described as the will of All. The basis of will, Rousseau holds, is interest. The individual wills always what is for his interest. His interests conflict at many points with the interests of others; but at some point the interest of all is the same. This common interest is what makes the state possible. The general will is but the expression

47. Tennyson : *Ulysses*.

48. Jethro Brown : *Ibid.*, p. 307.

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of what the common interest requires",⁴⁹. In spite of all his beautiful fancies and fallacies that have been severely criticized by the political philosophers, Rousseau's contribution in the realm of thought can hardly be over-estimated in giving to the world the idea of General Will as opposed to the Will of All as being the ethical basis of the State. If will and not force is to be the basis of the state, the will of the individuals must be trained and developed by education to comprehend the social will. It is the state and state alone which is responsible for inculcating the sense of responsibility and spirit of discipline in the citizens, so that they may willingly remain the most loyal subjects as well as aspire to the highest offices of the state. "It is the fault of the state if this conception fails to make him a loyal subject, if not an intelligent patriot. It is a sign that the state is not a true state; that it is not fulfilling its primary function of maintaining law equally in the interest of all, but is being administered in the interest of classes; whence it follows that the obedience which, if not rendered willingly, the state compels the citizen to render, is not one that he feels any spontaneous interest in rendering, because it does not present itself to him as the condition of the maintenance of those

49. Dunning : Political Theories From Rousseau to Spencer, p. 22-23.

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rights and interests, common to himself with his neighbours, which he understands" ⁵⁰.

There is another aspect of the matter. The Right to Education is a necessary concomitant of independence and the absence of education can only lead to abuse of freedom and rise of tyranny. As Laski puts it 'no freedom is worth while unless the mind is trained to use its freedom. We cannot, otherwise make explicit our experience of life, and so report the wants we build upon that experience to the centre of political decision. The right of the modern man to education became fundamental to his freedom once the mastery of Nature by science transformed the sources of power. Deprive a man of knowledge and the road to ever greater knowledge, and you will make him, inevitably, the slave of these more fortunate than himself.' ⁵¹.

The Right to Education is a necessary concomitant of the Right to freedom of discussion and Association. In the light of the observations already made above it would clearly appear that unless the citizens of the State have the right to freely discuss their ideas and form voluntary organizations to propagate those ideas to sway and form public opinion all freedom and education would be meaningless and futile. The Mind of the citizen trained

⁵⁰ Green, *Lib* p 127

⁵¹ H. J. Laski, *Liberty in the Modern State* p 51

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by education, must have the liberty to put
forward its ideas and thus criticize, help and guide
the state in its deliberations by all lawful
means. The experience of all individual citizens
is in the ultimate analysis the basis of all
future improvements in the organization, machinery
and activities of the state "obviously
enough if his experience is to count, a man
must be able to state it freely. The right to
speak it, to print it, to seek in concert with
others its translation into the event, is funda-
mental liberty. If he is driven, in this realm,
to silence and inactivity, he becomes a dumb
and inarticulate creature, whose personality is
neglected in the making of policy. Without
freedom of the mind and of association a man
has no means of self-protection in our social
order".⁵² The Soviet Constitution of 1936 has
already codified "Right to Education" as a
fundamental Right of the Soviet citizens, by
way of universal compulsory elementary edu-
cation, by free higher education and by the
organization of vocational education in factories
or farms. Although not explicitly mentioned
in other constitutions of the world, Education
is receiving due notice and attention from the
State and forms as a matter of fact one of
the fundamental methods of social welfare in
every modern State.

52. Ibid: p, 95.

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The denial of freedom of thought and discussion has been condemned universally in all civilized countries of the world. Socrates was administered hemlock for his boldness of free speech and discussion of the existing institutions of the world. Christ was crucified by an unbelieving world and Mohammad was pursued and driven out from his city and persecuted for years after. Yet all this persecution failed and failed ignominiously and the history of those persecutions testify to the permanent shame and disgrace of mankind. *Ancient Greece murdered the noblest of the philosophers whose system of thought and discussion were subsequently immortalized by Plato and Aristotle which later on formed the basis of European culture and thought.* The body was foully murdered but the soul survived and permeated the culture of the human race. Neither did the crucifixion of Christ, nor the persecution of the early christians by Emperors like Nero and Diocletian achieve any but negative results and the Roman Empire tried to survive at last by embracing the very christianity it tried to annihilate. The Prophet Mohammad not only survived his persecution, but the whole of Arabia fell to his feet even in his lifetime.

If we come nearer the times we find that men like Galileo Rousseau and Marx were

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ostracized for their opinions. Galileo's idea that the earth moves round the sun scandalized the whole of Christendom and the Holy fathers of the Church induced him to retract his idea, just as a criminal retracts his confession, and induced him to put the earth back in its proper place. "Seven cardinals condemned him to a period of imprisonment and he was ordered to recite the seven penitential psalms once a week for three years".⁵³. It goes to the credit of the tolerant English people that amongst them ready asylum was found by both Rousseau, the prophet of the French and Marx, the prophet of the Russian Revolutions from the oppressions and persecutions of the contemporary world although England fought most the ideas of these two idealists. Intolerance could not stifle their ideas which ultimately swept away every thing before them and the methods might not have been so violent if the repressions had been less.

The Right to freedom of speech and association has thus won all its battles relentlessly in both the ancient and modern world. But there is another aspect of the matter that requires proper appreciation, to secure the very ends for which the state exists.

In the modern world all progressive states are ruled by Public Opinion which is in most

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cases a mass of incoherent gossips, notions, prejudices, fancies and beliefs. How is this 'confused incoherent, amorphous mass, varying from day to day'⁵⁴ to guide and ennoble the higher activities of man unless the same is given adequate opportunities of publicity and discussion and organizing itself into coherent, tested and well formulated measures of public policy? The greater the facility of discussion and persuasion, the lesser the danger of wild fanaticism which arises only from suppression of an idea. As Laski says, "Rousseau was infinitely more dangerous as a persecuted wanderer, because infinitely more interesting and therefore, infinitely more persuasive, than he would have been when unfettered in Paris. Lenin did far more harm to Russia as an exile in Switzerland than he could ever have accomplished as an opposition leader in the Duma".⁵⁵ While discussion purifies the crudeness of ideas by the free discourse of the people and comparison with their own moral convictions and ideals of life, want of that facility adds to the halo of lustre around the repressed idea which gains in the lustre of an unknown excellence by the loss of the power to disseminate itself.

Secondly what after all is government by

54 Bryce Modern Democracies Vol. I p 173

55 Laski op cit p 110

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public opinion unless public opinion can interpose itself with freedom. Except highly controversial theoretical discussions of the ultimate values of life, confined amongst the few, ordinary mass of people are mostly concerned with the problems of their ordinary life. If they refer these problems to the arbitration of their fellow men, advance their own ideas and invite the ideas of others that is nothing but a movement in the right direction provided these proceedings are all real and beneficial and not hidden preachings of hatred and calumny. If the ordinary man is dissatisfied with certain commissions or omissions of the government they should have every right to ventilate those sentiments through legal and proper channel to try to convince the government of the impropriety of those measures or to allow the government to convince them in the proper way of the propriety of their action. For ultimately the people being the political sovereign of the state and the ultimate arbiters of their own destiny, should have every right to influence their government and influence their representatives in the legislature if they disagree with them on crucial points of public policy.

There are in the world only two ways of governing a people, viz, first, by breaking heads, i. e. by governmental fiat, violently repressing

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the dissenter; or secondly by counting heads, instead of breaking them, that is by the vote of the majority. Universal suffrage has now practically been accepted in all progressive states, and the people have been recognized as the only party competent enough to deliver the goods. Hence in the interest of the government itself, the public mind should be made free and fed with all sorts of proper materials so that they do not judge their Government wrongly, for if they do so it would not be their fault. And if once the Government is judged wrongly, no amount of repression or camouflage can save it for long. Of course as Lord Bryce has said "a truly national patriotism stills domestic discord at moments of danger, and helps to keep some questions above party even in quiet times".⁵⁶ but a Government that depends upon the patriotism of the people to keep itself in power inspite of feeling the popular pulse contrary to its own policy would not get the protection of that patriotism for long and would ultimately ruin its own prestige with that of the state in the ensuing general outburst of disaffection.

In the context of the present-day tendency of popular government of all civilized countries including Soviet Russia, it is one of the fundamental duties of the Government not only to

⁵⁶ Bryce : *ib. d.* p. 176.

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assure freedom of thought and discussion but also to foster the same by establishing wholesome channels of educating public opinion and thus securing its unanimity on the fundamental notions of national welfare. And once the basis of the state is made secure in this way by obtaining unanimity on the main principles of policy, to allow full freedom to the right of discussion and persuasion on matters of temporary or passing importance and guide the Governmental organs to be in conformity with the general trend of sympathies of the people.

It is thus seen, that in a democratic country the Government is both the leader of public opinion as well as its humble follower. It must avoid serious clashes and conform to the principle of adhering to the golden mean between enlightened public opinion on the one hand and principles of morality and other recognized and established precedents on the other. Bryce has put the whole idea in a nutshell as follows :-

“As the excellence of public opinion—is the real test of a nation’s fitness for self-government, so the power it exerts, being constantly felt as the supreme arbiter, irrespective of electoral machinery, is the best guarantee for the smooth and successful working of popular government, and the best safeguard against

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revolutionary violence" and this safeguard can hardly be secured without the Right to freedom of discussion and association.

In the state of Pakistan the right of Hijrat or emigration from a state where there is no liberty of pursuing one's own religious freedom should be recognized as one of the Fundamental Quranic Rights. It is rather a corollary of the Right to Religion and Right to freedom of thought and discussion. Many states in the world have already granted asylum to men and women persecuted for political and religious beliefs and the Constitution of U. S. S. R. has recognized the Right of Asylum as a Fundamental Right to foreign citizens persecuted abroad though not for religious belief, at least for defending the interest of the workers, for scientific activity or for participation in struggles for national liberation. The Hitlerite oppression of the Jews did not succeed in throwing open the Frontiers of either Russia or any Christian country to these helpless nomads of Europe and they had no other alternative but to fall back on the humanity of the Arab world. The right of Asylum is therefore a fundamental right of man which should now-a-days be recognized by all civilized states of the world as a Socrates, a Galileo, a Rousseau or a Marx persecuted to-day be claimed as saints and savants to-morrow and their untimely

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persecution and death may be averted for the ends of civilization.

The Rights enumerated above should be guaranteed and enforced by the Fundamental laws of the State in the sense that those laws may not be lightly and easily changeable in the ordinary way by the ordinary legislature. These rights being the safeguards of the ordinary man against the tyranny of the stronger groups, associations and influences, should not be changeable without the direct intervention and active consent of the people who are the ultimate authority and sovereign in all political matters. These changes should be made exclusively by the people themselves by amending the Constitution and not by their representatives in the ordinary way. These Rights being fundamental to the peace, progress and happiness of the citizens of the state, the necessity to change or alter them should be judged and the change or alteration effected by none but the people alone and they alone should be responsible for accepting or changing the fundamental laws of the state, being themselves the ultimate beneficiaries.

The Original charter of Fundamental Rights in England was secured by the English people from the unwilling hands of king John in 1215 A. D. As the Twelve Tables in Roman History secured the freedom of the Roman

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people from the tyranny of priests, so the Magna Charta or the Great Charter secured the freedom of the English people from the tyranny of kings and transformed England as H. G. Wells says from a regal to a legal State, which inspite of the abortive attempt of Pope Innocent III to set aside and abrogate by excommunicating the king who granted it and the Barons who exacted it, remains to this day a monument of public Rights amongst the Fundamental Laws of the world, and is regarded as the corner-stone of English Liberties. The main two provisions of the Magna Charta were firstly that the King could not imprison and punish his subjects as he pleased, but that each man must be judged by his equals and secondly that he might not levy taxes without the consent of the bishops, earls and the barons of the realm.

In 1628 A. D. the second memorable charter of English Liberty was secured by the Parliament namely the Petition of Right, which cited the Magna Charta rehearsing the limitations upon the powers of the Kings of England. The provisions were first, that no free man should be asked for a loan without consent of Parliament. Secondly, that no free man should be sent to prison without a cause being shown. Sir Edward Coke, Chief Justice of the Court of Common pleas took lead in wresting

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these concessions from the king the passing of which celebrated by bonfires, rejoicings and ringing of bells ushered in a new chapter of the liberties of the people.

In 1285 A. D. the third charter of the Fundamental Rights of England was drawn up by the Parliament of England which was passed under the name of the Bill of Rights. Amongst other things the Bill declared that "the Ecclesiastical Commission Court was illegal, that the king cannot suspend or dispense with the laws, nor raise money, nor keep a standing army without consent of Parliament; that subjects may petition a King; that all elections of members must be free, and that there must be perfect freedom of speech in Parliament which should be held frequently to redress grievances and strengthen the laws. That Jurymen must be honestly chosen and in trials for high treason must be freeholders; while excessive fines and cruel, unusual punishments must not be inflicted. And no Papist should ever again hold the Crown of England."

English liberty is based upon these Fundamental Laws which no Parliament would dare touch, alter or change except with the active concurrence of the whole people of England and these documents have obtained so much sanctity by efflux of time that whether the people themselves would even dare touch them

is a matter of great doubt except in times of unprecedented upheavals or national emergencies. Laski, an Englishman has recommended "the institutional mechanism for the safeguarding of freedom" by a Bill of Rights in the English model. "They are enshrined in a document which cannot, constitutionally be invaded either by the legislature or the executive, save by a special procedure to which access is difficult. The first Amendment to the American Constitution, for example, lays it down that Congress shall pass no law abridging freedom of speech; and any Act of Congress which touches upon the matter can be challenged for unconstitutionality before the Supreme Court. The Amendment moreover, cannot be attacked save by the usual process of Constitutional change in America; and that means that, except in the event of the American revolution, it is unlikely ever to be directly attacked at all".⁵⁷.

Two other great charters of human liberty which have pulverized human thought in subsequent ages are the American Declaration of Independence of 1776 A. D. and the Declaration of the Rights of Man made by the French National Assembly in August 1791, as Bryce puts it "These two declarations, delivered authoritatively by two bodies of

57. Laski : *Ibid*, p. 75-76

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men at two moments of far-reaching historical importance, contain the fundamental dogmas, a sort of Apostle's Creed of democracy. They are the truths on which it claims to rest, they embody the appeal it makes to human reason".⁵⁸. The declarations run as follows:—

American Declaration: "We hold these truths to be self-evident; that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness, that to secure these rights, Governments are instituted, deriving their just powers from the consent of the governed".

French Declaration: "Men are born and continue equal in respect of their rights".

"The end of political society is the preservation of the natural and imprescriptible rights of man. These Rights are liberty, property, security and resistance to oppression".

"The principle of all Sovereignty resides essentially in the nation. No body, no individual can exert any authority which is not expressly derived from it".

"All citizens have a right to concur personally or through their representatives, in making the law. Being equal in its eyes, then, they are all equally admissible to all dignities, posts, and public employments".

58. Bryce : Ibid : Vol i : P, 48-49.

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"No one ought to be molested on account of his opinions, even his religious opinions".

The Turkish Constitution provided for the Fundamental Rights of its subjects under the following Articles :-

Article...70—"Personal inviolability, right and freedom of conscience, thought, speech, publication, travel, contract, work, property and use and disposal of property, meeting, association, form part of the national rights of Turkish citizens.

Article...71—Life, Property, honour, domicile, are inviolable as against any trespass.

While the English Charter of Rights were practical cut and dried rules of external human action with little or no philosophical flourish the American and French declarations made in quick succession under the influence of philosophical idealists like Rousseau, Paine and Jefferson were mostly an abstract and verbose description of the natural rights of man made so much of by the exponents of Natural Law and Natural Rights.

We may thus classify the fundamental Rights as follows :—

1. Right to Life.
2. Right to Liberty.
3. Right to Religion.
4. Right to work.

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5. Right to Education.
6. Right to freedom of thought and association.
7. Right of Hizrat.

These rights are so important to the welfare of the common man that they should be incorporated as a part of the Constitution itself, unchangeable by the ordinary process of legislation, except by the will of the whole people and other important groups, associations and corporations. The mere declaration of these rights would not be enough. They ought to be made an indispensable part of the curriculum of education in every educational institution and the violation of these rights must be attended with a sanction as codified in the schedule of the Constitution. These declarations should be in the form of positive laws, commands by the sovereign to the subject and the sanctions must be proclaimed throughout the republic. These declarations would then be reckoned as the fundamental laws of the constitution and every subject of the state must not only be conscious of the existence of those laws but also must be fully confident that any violation of their Rights would be jealously prosecuted by the State at public expense and jealously protected by the Court of Law under their fundamental obligation to protect the constitution as sacred trust.

If any future Gibbon Surveys the decline.

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and fall of the Islamic civilization towards the 17th Century and analyses the reasons of gradual decline and decay of the Muslim Empires in Spain, Egypt, Turkey, Central Asia, Arabia Persia, India, Indonesia and other countries of Hither East and west, the reasons probably would be found in the failure of Islamic Jurisconsults to devise a system of Constitutional Laws, for the organization of States and to declare, define and enforce the fundamental Rights of all the citizens in their empires and thus proclaim the charter of Human Rights as contained in the Quoran for the benefit of humanity. Quickly the entire Islamic World was punished by the Lord for this abject failure by forfeiting their right to Rule the world, as clearly presaged in the concluding lines of Sura an'am (VI). Yet He is Out-forgiving, Most Merciful and has granted another opportunity to the Muslims to make yet another attempt and already the whole Islamic world is in ferment to succeed where their forefathers failed. Let them proceed by the Seratul Mustaquim—The straight Path—of Islam.

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“O ye People of the Book
 Exceed not in your religion the bounds,
 Trespassing beyond the truth
 Nor follow the vain desires
 Of the people who went wrong
 In times gone by
 Who misled many,
 And strayed from the even way”.

Quoran : S. V : 80.

Ancient Greeks devised the idea of Constitutional Law in its rudimentary form. “The Constitution” says Isocrates, “is the soul of the State”, while Aristotle identified the constitution with the state itself “The constitution is the State”. But Greece never evolved a constitution. The rapid succession of constitutions one after the other in all the states of ancient Greece followed naturally just as a child quickly changes its toys. Athens changed her constitutions eleven times between 624 B. C. and 404 B. C. alone and similar or more rapid changes took place in all the other city States. Every change in the constitution was brought about by a revolution and the change was effected in every aspect of life. Solon was the first Greek States-

man to draw up the outlines of a constitution on a "carefully laid-out plan" ⁵⁹. Although the idea of the constitution of the state was highly developed and adequately discussed by the time of Aristotle, the Greeks never reached the idea of union of all their people under one constitution which should be gradually developed and perfected with the growth of experience. The constitutions of the different existing city states were to them a body of ordinary, changeable, municipal bye-laws, each municipality having its own bye-laws changeable according to the exigencies of the moment or change of rulers. At last when the Greeks rose to the appreciation of higher principles of statehood, the organic nature of the state, an association for realization of the highest good and of the utility of different forms of constitutions, they lost their independence and subsequently became a conquered province of the Roman Republic.

Rome had never a constitution but developed certain constitutional Principles. The constitution known as the Servian Constitution which is said to be set up by Servius Tullius sometime before the close of the monarchical period, was rather certain concessions granted to the Plebians, than anything like the structure of a constitution, certain checks and balances upon the Executive power from time to time more

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to safeguard the liberties of the people than upon any thing like rigid principles of constitutional Law.

We may thus summarise the constitutional development of Greece and Rome by saying that while Greece evolved the idea of constitutions it never succeeded in formulating a constitution for herself and although Rome had developed public life it had no public Law. In the best days of Greek Democracy we find that Aristotle considered one-man rule as the best form of Government if such a man of pre-eminent excellence was found, and, Plato considered the Government of many as "essentially a weak government"⁶⁰. It was due to this failure of the Greeks to carry the constitutional idea to its logical conclusion by establishing one state under one constitution that the most brilliant people of antiquity lost its glorious heritage. As Sidgwick observes: "We may be almost willing to agree with Aristotle that the Greek race, from the happy blending and balance of qualities, might have conquered the world if it could only have brought itself to live under one government."⁶¹.

Rome developed many institutions of a constitutional Government but never a constitution. Polybius in the second century B. C. found

⁶⁰ Sidgwick : Development of European Polity : P, 113.

⁶¹ Ibid : P, 118.

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the Roman constitution (if we may call it so) as a curious mixture of Monarchy, Aristocracy and Democracy, elements of the one unconsciously blending with the elements of the other. The Empire of Augustus became something like a constitutional Monarchy, which later degenerated into absolute tyranny. As a matter of fact the Romans at no time could conceive that the highest magistrates of the state could be called to account for any action during the tenure of their office, which amounted to the conception that the magistrate was the State and his orders however illegal, arbitrary or unjust could never be "unconstitutional" nor could be challenged in any Court of Law. The idea of a constitution, supreme over all magistrates, which every citizen including the magistrates were legally bound to uphold, was foreign to Roman public life. Hence checks and balances of having separate set of magistrates for curbing the arbitrary actions 'inter se' was adopted as the final remedy in the Roman scheme of Government.

Thus bereft of the idea of a constitution ordering the structure of the state and defining the powers and duties of the different organs of the Government both Greece and Rome fell a victim to the confusions of their own systems and the Romans ultimately formulated the conception of Natural Law or Law

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of Nations, Jus Naturale or Jus Gentium, which were almost convertible terms, to secure the fundamental rights of man against Governmental tyranny.

The history of the middle ages hardly affords much room for development of the constitutional Idea. The two religions Christianity and Islam came and conquered the world with their moral and religious influences which gradually transformed the Greek ideals and Roman conceptions in different ways in different lands. Absolute monarchy of some type or other prevailed everywhere in the world checked only by the religious convictions of the rulers and ideas of public morality, till it obtained its first check in England in 1215 A. D. which gave birth to the Magna Charta and in France, in May 1789, which gave birth to the French Revolution.

The present ideas of Constitutional Laws are all products of the English political life. All the present day constitutional Governments derived their constitutions either mediately or immediately from the British system of Government, modified by the ideas of the American and French Revolutions. Although the Russian Revolution has introduced a completely different type of Government that is also in essence a product of the British type of representative parliamentary Government modified by the

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ideas of the dictatorship of a single class which is to all intents and purpose a reversion to the ideas of Plato and Aristotle. But the broad fact remains that government by the representatives of the people, chosen on universal, or limited suffrage, acting within the limitations and frame work of a written or unwritten constitution, guarded by the Judiciary from the encroachment of the executive, is at present the universal type with local and natural modifications here and there to suit the genius of the people. Hence the constitutions thus adopted by the different states are in law the ultimate Code of Reference to all the civilized governments of our times, most jealously guarded as the emblem of popular sovereignty.

The ideal of the present day utopians like Anarchists and Communists is ultimately to do away with the State and rid mankind of the shackles of governmental institutions, so that man by his inherent reason and enlightened self-interest may guide his own destiny. Some of them urge violent some non-violent means to attain that happy consummation and some aspire to the ultimate painless transition to a stateless society at all events as an inevitable reality. Whatever may happen, however, to the fate and future of the State, so long as that unhappy institution is considered necessary by humanity, some sort of Constitution must form the very

basis upon which its structure and edifice may be built up harmoniously in consonance with the moral ideals of the people constituting the state.

FRAME OF THE GOVERNMENT.

The dispute regarding the Unitary and the Federal State has practically been set at rest in modern times. It is admitted on all hands that the unitary form is best fitted to small States having a homogenous territory and population, with very little or no local patriotism, interests and culture, with easy and accessible means of communication between the people of the different parts of the State. England, France, Japan are well fitted for the unitary form but even in these states hundreds of years and much bloodshed were necessary to include the entire territories into one compact state. In England although the local patriotism of the different parts were subdued for a time, the Irish people have even after struggle of hundreds of years been successful in shaking off the ties of the Unitary Government of Great Britain and the Irish Question has all along been the most painful thorn at the sides of the Government of Great Britain and Ireland. Neither Ancient Greece nor Ancient Rome could find their vast territories and conquests in one unitary state. Although Greece developed

the idea of confederation and ran the Confederation of Delos for sometime under Athenian Leadership, the object of the Confederation was to protect the Greek city-states from Persian invasion and the Confederation was nothing but a military alliance and its object was to distribute the cost of defence equally between the component units. In 466 B. C. Naxos refused to be any more a member unit when she was conquered and made a subject of the Confederacy which changed the whole character of the thing. With the transfer of the Treasury from Delos to Athens in 454 B. C. the Confederacy changed into an Empire of the Tyrant City of Athens. About 378 B. C. the second experiment of a Confederacy under the hegemony of Athens was started again but again failed within a period of 20 years. The history of the Peloponnesian confederacy is the same with Sparta substituted for Athens. The failure of the Greek Civilization was the result of the inability of the Greeks to develop these Confederacies into a real Federation, although the Greeks tried again in the Achaean, Lycian, Aetolian, Archadian and other Leagues which all gradually sank into the Empire of Rome.

Smallness of territory alone cannot create a Unitary State nor maintain it for long unless other factors play a prominent part. Switzerland the oldest Federal Democratic Republic in

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the world shows that even small countries can be better organized on the Federal principle than on the Unitary principle. Towards the end of the Thirteenth Century three small cantons formed this League for mutual defence and protection. Up to the French Revolution the number of the acceding cantons rose up to 13. At the time of Reformation half the number of cantons were Protestant and half Catholic and although the rest of Europe was torn by religious convulsions, Switzerland steered clear of the troubled waters of the times. She was recognized in 1648 as an independent State by the Treaty of Westphalia. But she was more or less a Confederation of the Greek type without the hegemony of any particular canton up to the French Revolution, held together for the purposes of Defence. The Helvetic Republic of the centralized type created by Napoleon crumbled down with him and by 1848 the present Federal State was born.

Of the people nearly two-thirds speak German and the rest speak many other languages, mostly French. The majority are protestants, the minority Roman Catholics. The people have no homogeneity, either in language, religion, character, ideas or ways of life. One-third of the people are agriculturists and the rest are manufacturers of small degree. But the Federal

Principle has made and kept them the most ancient existing Republic which otherwise might have been swept away by the force of circumstances during the last seven hundred years.

Thus it is seen that even smallness of territory is no guarantee of the propriety of the Unitary form of Government where there are local patriotism. In the modern world the Federal form of Government has received the warmest tributes as satisfying both the human wants of unity and diversity. As Sidgwick points out it is "a whole made up of parts, with approximate equality of political position among the parts, and a clear and precise as well as a balanced and stable constitutional division of governmental functions between the government of the whole and the government of the parts",⁶² and this is the only form which can successfully harmonize and overcome the mutual jealousies and love of independence of the units. And the advantage of this form of composite state 'lies in the fact that it permits, without undue or enforced centralization the recognition and establishment of common interests'.⁶³

A Written Constitution of the Rigid type ; the guarantee of the permanent recognition of popular and local interests in the Federation,

62. Sidgwick *Ib d* P 434

63 Mac Iver *The Modern State* P 361

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which leaves the residuary powers in the Units, the Federation controlling only the powers vested in it by the Constitution Act. As Mac Iver puts it "The written Constitution is the expression or embodiment of a will more fundamental than any which is exercised by either the federal state or the constituent states".⁶⁴. In Canada certain definite powers are granted to the units, the residuary powers being vested in the Federation, whereas in the U. S. A., the residuary powers are vested in the Units. Switzerland follows the U. S. A. more or less in the distribution of powers, but has certain concurrent powers which both the Cantons and the Federal Government may exercise.

The power of amending the Constitution in Canada is legally vested in the British Parliament and not by the people nor by their representatives, unlike in U. S. A. and in Switzerland. The constitution of Switzerland can be changed by the people alone and they can either ratify or initiate the change. Both the Houses of the national Parliament may initiate the change and submit it to the popular vote. Even one House or 50,000 qualified voters may initiate the change and submit to the popular will and if approved by the majority then, after a new election of the Legislature the Parliament would proceed to amend the

⁶⁴, Ibid : p. 359.

Constitution and again submit it to the popular vote. The majority of citizens, as well as the majority of the Cantons must approve the revision before it finally goes into effect. Up to 1918 the constitution was amended 12 times and 5 amendments had been rejected by the people. This ratification by the people is analogous, to a certain extent, to the direct legislation by the people in ancient Greece and is preferable because the people are ultimately the beneficiaries as well as the repository of the sovereign power and no amount of good government can train the people in the arts of self-government unless the people can themselves exercise power and learn the responsibilities of doing so.

In the United States of America the powers of both the Executive, the Legislature as also of the Judiciary are strictly limited by the Constitution which is practically the mother of Federal Constitutions as the British Parliament is the mother of Parliaments. "Whatever powers can not be exercised by an elected authority have been reserved to the people as the ultimate power capable of dealing with such matters. Whatever powers cannot be exercised by an elected authority have been reserved to the people, who exert them by amending the Constitution. The stability in great things, co-existent with changefulness in small things.

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which is characteristic of the United States, is largely due to this doctrine and practice of limited powers, a feature foreign to the French scheme of Government, and less marked in some other Federal Governments with Rigid Constitutions, such as Switzerland, Canada and Australia".⁶⁵.

The power of Amendment of the Constitution in the U. S. A. is ultimately vested in the people. The procedure is to a great extent similar to that of Switzerland, with a slight difference. The amendments may be proposed either by a majority of two-thirds of both the Houses of the Federal Congress jointly, or the legislatures of two-thirds of the States may petition the Congress to call a general Convention to consider the proposal which may itself propose changes or amendments. In both these contingencies, the proposed change must be submitted to the states to be voted upon either by the State legislatures or State Conventions, as the Congress may determine. Any amendment accepted by as least three-fourths of the States goes on the Statute Book. In U. S. A. therefore the people do not directly vote on the constitutional change as in Switzerland. They merely elect their representatives in the convention or the legislature who ratify the change.

In England and France which are unitary states the legislatures themselves are competent to change their constitutions with the difference that in France both the Houses of the Legislature sit together at Versailles jointly as the National Assembly to effect the change.

We must keep in view these principal Constitutions of the world to enact a suitable Constitution for Pakistan to suit the genius of its people, keeping always in view the nature of the territory, population, communication, feelings, sentiments and culture of the different parts of the State. The physiography of Pakistan is unique and unparalleled in the history of mankind. The eastern and western parts of the state are intervened by the whole breadth of a not too much friendly Republic of India, the distance being roughly two thousand miles by land route and much more by water. The distance in space is also supplemented by difference of language, climate and history. Therefore the nature of the territory and population of the State gives only one solution to the question about the frame of Government viz. the Federal solution. In view of the recognition of the Federal principle in the Preamble which has already been passed by the Constituent Assembly the dispute has already been set at rest. The question is where ultimately

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the sovereignty will reside in the Federation, i. e. how would the power of amendment of the Constitution be located and organized as discussed above.

In this connection it is necessary to read side by side the contents of the world-famous Pakistan resolution of Lahore passed by the All-India Muslim League in March, 1940 with that of the Preamble to the Constitution of Pakistan, as finally passed in the same month (March, 1949) nine years later:—

Pakistan Resolution, March, 1940.

“Resolved that it is the considered view of this session of the All-India Muslim League that no constitutional plan would be workable in this country or acceptable to the Muslims unless it is designed on the following basic principle, viz., that geographically contiguous units are demarcated into regions which should be constituted with such territorial adjustments as may be necessary. That the areas in which the Muslims are numerically in a majority as in the North Western and North Eastern zones of India should be grouped to constitute Independent States in which the *Constituent units shall be autonomous and sovereign.*”

Objectives Resolution, March, 1949
(or the Preamble).

“Whereby the territories now included in or

in accession with Pakistan and such other territories as may hereafter be included in or accede to "Pakistan shall form a Federation *wherein the units will be autonomous* with such boundaries and limitations on their powers and authority as may be prescribed."

It would appear from the above that the Lahore Resolution envisaged the component units of the Federal State to be autonomous and sovereign, whereas the word "Sovereign" has been omitted from the Objectives Resolution. There has been much wrangle over the question of Sovereignty in a Federal State and in the ultimate analysis the omission of the word "sovereign" from the Objectives Resolution is a matter of very little moment. For it is well-recognized by our times that sovereignty in a Federal State is limited and the component units or states retain a sort of limited sovereignty within their own sphere of action, although it has been argued by another school that the power of amending the Federal Constitution actually locates the seat of sovereignty. But as pointed out by Mac Iver, the component States by their Act of Association and Articles of Union do not completely divest themselves from their sovereignty. "For in a true federation each constituent has ex hypothesi a certain autonomy, recognized in the articles of union. This would seem to imply that no change of

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its relations to the whole or to the others, legitimately be forced upon it by a majority outside itself, or more strictly, that, apart from the conditions it has accepted in entering the federation or at any later time, it remain in the position of a free state"⁶⁶.

The point has been further illustrated by Woodrow Wilson as follows:—

"The one set of authorities is sovereign; for it presides, and the range of its powers is, in the last resort, determined by itself; but the other set of authorities exercises full dominion, though in a narrower sphere. Its powers are independent and self-sufficient, neither given nor subject to be taken away by the Government of the Union, originative of rights, and exercised at will".⁶⁷.

The other omission, the substitution of the word "unit" for the word "State" is also immaterial, for what is in a name! The word "provinces" now used to denote the main units like East Bengal, West Punjab, Sind, North West Frontier and Baluchistan would have to be changed any how and the same appellation must be given to all units whether Provinces of British India or Native States and it is clear that all the units, whether big or small would have the same legal and

66, Mac Iver : The Modern State : P, 379.

67, W. Wilson : The State : P, 565,

political Status and the word "province" would not logically apply to the autonomous and partially sovereign federating units.

It is therefore clear that the frame of the Government of Pakistan would be that of a composite state, a Federation, of certain units, who by the act of Association would expressly divest themselves of certain powers which would be vested in the Federation, or both the Federal structure and the component states would be "created" by the Constitution Act, both sets to derive their powers from the Constitution itself and each supreme and sovereign within its own sphere of action. The question is where would be located the power to Amend the Constitution!

It seems that the power to initiate the changes or amendments must be vested in the Federal Legislature alone. Power given to any other body would be firstly difficult, practically impossible, to organize and exercise; and secondly power so given would be seldom, probably not at all, exercised. In America all the 15 amendments to the Constitution were proposed by the Congress and no constitutional Convention has been called since 1787. The power to initiate should always be vested in the Federal Legislature, which may be moved either "Suo Motu" or on the resolution of the legislatures of one or more states recommending a revision. It seems best that any revision of the Constitution

of Pakistan, proposed by a two-thirds majority of both the Houses of the Federal Legislature should be submitted to the state legislatures and must be approved by the two-thirds of the states legislatures in the American fashion and then if so approved by 2/3rds of the federating states must finally go to the people of Pakistan for their final adoption who may accept or reject the same by a bare majority.

This system would at once combine the best elements of both the Swiss and American Constitutions and ensure sovereignty of the people who are ultimately the repositories of state sovereignty. It would further have the salutary effect of educating the popular mind and ingrain in them a respect and esteem of the Constitution of which they are the final arbiters. It would also remove the reproach that is levelled against democratic countries that the people therein have no right to have a say in the matters of government except exercising a remote and hypothetical control by electing their representatives once in four or five years which even they are goaded to choose at the spur of the moment. The power of the people to say the last word in this matter also is consistent with the dictum of political philosophy that Law is nothing but a mirror of public opinion and the dictum would hardly be true to life if the mirror reflects the countenance not of the people.

but of certain other venerable gentlemen who may either be much in advance or behind the times.

The provision of submitting the change of constitution to the will of the people has another salutary aspect. In the modern civilized world ignorance of law is no excuse for any man, however poor and ignorant he may be and every citizen is supposed to know the law. This provision would make the legislative bodies to be at pains to consult public opinion and sentiment and give them the chance to know the law by educating themselves. The parties sponsoring the change would be brought close in contact with the masses and their sense of patriotism would be elevated and sense of responsibility stimulated and the authorities would be under the necessity to put bills into the shape most brief, simple, and comprehensible "by the average citizen"⁶⁸. Moreover as Bryce puts it "In a democracy it is only the people who can put an end to a controversy"⁶⁹ as the final Court of Appeal.

It is needless to state that the component units to the Federation of Pakistan should have the same sort of constitutional machinery *muta mutandis* to change the state Constitutions. To make slight revisions of state constitutions

⁶⁸ Bryce, Modern Democracies Vol-I P. 440

⁶⁹ Ibid P 442.

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it is unnecessary to change the entire Federal Constitution and thus put into commotion the entire people of all the states composing the Federation. Every federating state should have the complete power to change its own Constitution which should be initiated by the joint resolution of both the houses of the state legislature by a two-thirds majority and submitted to the final arbitration of the people of the state, who may accept or reject the same by a bare majority.

The spheres of legislation of the Federal and state legislatures should be allocated on scientific principles so that all matters of Federal importance concerning the protection and defence, of the Federal State, International affairs, Customs, Post Office, Railways, Inter-State commerce and communications, Control of the Air and Sea, Armies, Dockyards and such other important subjects as materially affect the entire people of the Federation should be demarcated and placed in the Federal List leaving the residuary powers in the federating states of Pakistan. In cases of conflict the Federal Judiciary would, of course, have the final say in the matter and will have to interpret the constitution finally. The device of concurrent legislation is a morass of unknown evils. It evoked a great deal of praise from the Simon Commission as such a scheme would have been very much beneficial

to the British Government for facilities of overruling provincial legislation in case of inconvenience. As Sir Safa-at Ahmed Khan pointed out at an early date, the scheme of Concurrent Legislation would be the back door method of enlarging the Federal List and depriving the federating units of any effective say in the matter. "If any provision of a law of a federated state is repugnant to a Federal Law which extends to that State, the Federal Law, whether passed before or after the law of the state, shall prevail, and the law of the state shall, to the extent of repugnancy, be void" ⁷⁰. Further this device would not only be a mere lie embodied in the constitution but also evolve the component units of the Federation in ruinous and fruitless litigation as confessed by no less a man than the Prime Minister of Canada. Lord Selbourne who drafted the constitution of South Africa made this clear in the House of Lords in the debate on the Government of India Bill of 1919 "when I had the honour of taking part in framing the constitution of the Union of South Africa, we received a special message from Sir Wilfrid Laurier, the Prime Minister of Canada to this effect, 'Shun concurrent legislation as far as you possibly can—it is the very devil. It has been the curse of Canadian politics; the snare of statesmanship.

70. Sir Safa-at Ahmed Khan : The Indian Federation : P. 102.

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Avoided it'. This advice was taken, the constitution of the Union of South Africa avoided it with considerable ingenuity and skill. But although the advice was taken by South Africa, the Government of India Act of 193 re-imported the same and the devil banish from South Africa got congenial asylum on the shores of the Indian Ocean. Pakistan would do well to steer clear of this island of Circe and leave the same for the attention of the heriocr Trojans of Canada.

THE EXECUTIVE.

The next question of supreme importance both in the Federal Constitution and the State Constitutions is the nature and position of the Chief Executive of the States and the Federation. Whether the Executive Head of the Federation be Unitary or Collegiate would practically require little discussion. The Collegiate type was prevalent in Sparta and Rome and is prevalent in our times in Switzerland and Russia. The Collegiate type arose simply out of the fear of one man rule, for fear of despotism. As we have seen in Sparta and Rome the powers of the kings and consuls were limitless and inviolate during their life or term of office and hence to check one king or consul, another was kept. It was mainly due to the absence of the Constitutional idea where the power of

every body is limited and circumscribed by the terms of the Constitution. In modern times the Swiss Republic and the (U. S. S. R.) Soviet Republic have both the same sort of Collegiate Head where executive power is vested in a council of seven in the one, and a council of commissars in the other. As Woodrow Wilson has pointed out, the distrust of one man has gone so far in Switzerland that not satisfied with vesting the Executive power in a Council of 7 (Bundesrath) even the cantons and the Federal legislature have been vested with the power of correction over the council "as no other country has known"⁷¹. The Russian system has adopted the Swiss system with the same purpose and same fears. Tortured throughout the centuries by the despotism of the Czars and their vassals, the Soviet Republic has distrusted any single man with all the glory and romance of power and the Council of the People's Commissars jointly exercise all the executive powers of the state, "in the intervals between the meetings of the All Russian Congress of Soviets" only. "The Commissars can be recalled at any time by the Central Executive Committee, as the members of all soviets can also be very easily recalled by their constituents at any time"⁷². The Soviet

71. W. Wilson : The State : P, 314.

72. Bryce : Modern Democracies : Vol-II : P, 639-40.

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system is therefore the Swiss system writ Large. But everywhere there must be one man who by his position, or power or wisdom is given pre-eminence over the rest of the members of the College exercising sovereign powers as Lenin and Stalin have successively proved in Soviet Russia. But even the Soviet system had to be brought into line with the other unitary democracies of the world during the last war, when Stalin assumed for himself the Prime Ministership of the Soviet State and changes in the Constitution were made accordingly.

It therefore seems that the collegiate type of Executive is not suited for Pakistan. In fact all the Muslim Empires and States that ever existed were all of the unitary type. At present there are four methods of choosing the executive heads :

- (i) The principle of heredity ;
- (ii) Direct popular election ;
- (iii) Indirect election by a special convention elected for the purpose ;
- (iv) Election by the legislature.

Of the four methods, the principle of heredity has no sanction in Islam or of the Prophet and his immediate Associates. As a matter of fact the first four Caliphs of Islam were elected as the best amongst the faithful. Later, as is quite natural in the history of big empires like Rome and Persia, the republic

degenerated into the monarchy of the absolute type. At the present moment the stage has been quite conveniently set for the republican type in Pakistan as no royal house is clamouring for headship of Pakistan nor has any remote right of doing so. Of course, the constitutional hereditary monarchy of the English type seems best suited for the Middle-East Islamic countries like Egypt, Arabia and Persia, but Turkey and Indonesia have already made short shrift with Monarchy and have obtained for themselves a republican Constitution. Pakistan has got to begin on a clean state with a clean conscience and with the Quoran in hand and the wisdom of the ages by its side, it needs no bothering about any monarchy at all. It is therefore clear that an elected President or Khalifa, elected for a term of years should be the Executive head of the Federation of Pakistan. The term 'Khalifa' is much more appropriate than the word President and the former is associated with the greatest period in the history of Islam and has reminiscences of the noblest memory for every muslim who glorifies himself in the glories of the Kholafa-e-Rashidin.

The term "Khalifa" which literally signifies "agent" or 'Vicegerent' occurs in the Quoran. As used in the Quoran the word has no special or spiritual significance. In Sura Baquar, man is designated as God's 'Vicegerent' on earth.

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as given below :—

“Behold, the Lord said to the angels

‘I will create a vicegerent on earth’.”⁷³

According to the true meaning of the Quoran every man is the agent of God on earth. The Executive Head of the State would be nothing but the agent of the agents. The term was applied to the first Caliphs in another sense. The term “Khalifat-ur-Rasulullah” was applied as the designation of Abubakar and Umar his successor used the title Khalifat-e-Khalifat-ur-Rasulullah, the agent of the Prophet which being too long was subsequently abbreviated.⁷⁴. But the only true political significance of the term must be that the Khalifa is the agent of the public, who have inherited all power from God, as his vicegerents, and therefore is bound to administer the country justly deriving his just powers from the consent of the governed.

As Shushtery quotes, Abubakar, after his inauguration delivered his presidential speech as follows :—

“Lo, I am one like you and not better than you. If I am right, obey my orders ; If I am wrong, do not obey.” Shushtery truly laments “This democratic spirit lasted for thirty

73. Quoran : Allama Yusuf Ali : S-II : 30,

74. Hitty : History of the Arabs : P, 178,

years, when Hasan, the 5th Khalifa abdicated. Thus the democratic form of government and the simple tribal system gave way to a centralized or hereditary rule * * *. The sovereign power was inherent in humanity as a collective body and not in any individual. A Khalifa who believed and ruled with such spirit was recognized as the right Khalifa; if not, he was considered an usurper"⁷⁵. Syed Amir Ali was also of the same view and found the same political ingredients in the spirit of Islam. As he said "An examination of the political condition of the Muslims under the early Caliphs brings into view a popular government administered by an elective chief with limited powers. The prerogatives of the head of the State were confined to administrative and executive matters, such as the regulation of the police, control of the army, transaction of foreign affairs, disbursement of the finances, etc. But he could never act in contravention of the recognized law."⁷⁶. As Khuda Bux visualized in his own way: "The head of the State and the church was a popular nominee with very clear duties and very distinct obligations. Nothing like it has ever been realized in the East and Europe itself has

75. A. M. A. Shushtery : The Outlines of Islamic Culture Vol-I :
P, 47-50.

76. Amir Ali, Syed : Spirit of Islam : P. 278

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hardly any example to cite of so perfect democracy as was the one established by Islam."⁷⁷.

The procedure of the election of the Khalifa or the President is to be determined with utmost care and caution to avoid the farce and mummery that ensued between Hazrat Ali and Muawiyah and led to fratricidal wars amongst the muslims inter se. The election of Hazrat Abubakar as the first Khalifa took place at Madinah by the vote of the Muslim Leaders. Abubakar to avoid friction nominated Omar as the next incumbent for the post. Omar nominated a board of six electors who were empowered to elect the Khalifa with the stipulation that his son should not be elected to the post. The principle of a rough sort of collegiate election was laid down by Omar which was not followed after him and the hereditary principle was established. In the early days of Islam nothing was probably possible in a desert country like Arabia with little or no facilities of communication between the different parts and the elective principle still in its embryo. Young Turkey adopted the scheme of election of the President by the Great National Assembly, who holds office for a term of 4 years and may offer himself for re-election. The Turkish constitution,

77. S. Khuda Bux : Studies, Indian and Islamic : P, 9,

bestowed in the midst of the commotion of the civil war and ruin of the Caliphate when the people had little or no chance of obtaining proper political education, was the best that could be done in the circumstances.

The Executive Head of the State is elected by the legislature in France and Turkey as also the Executive Council in Switzerland. This method of choice practically makes the President a creature of the legislatures and places the entire responsibility on the shoulder of a few persons who may use corrupt methods to bolster up a sufficiently powerful and ambitious candidate and would thereby make him subservient and powerless before his electors specially in view of the contingency of re-election. Unless the President is meant to be a nominal figurehead to ditto in everything the decision of his ministers of state, who must be a sub-committee of Parliament, election by the Legislatures would make him a mere standard bearer of the cabinet, a President who would neither rule nor govern.

Besides, the function of the legislature is not election and such powers granted to the legislature is an encroachment upon popular rights. France torn by the dissension of the multiple party system is never able to obtain a stable government with any consistent policy

and to add to its misery, the President, unable to command much deference before those who elected him, generally effaces himself and is helpless to steer the course of public affairs or be of any use to the country in steering the oars consistently in the troubled waters of the multiple party system. And the result has been that France has been going down in prestige and position in international affairs and could take no advantage of the Versailles Treaty to fall at the slightest onslaught of Hitler's Germany. In recent times people have wanted a President of the American type again and again holding that "such a President especially if elected by the people, would be well-suited to a democratic country." ⁷⁸.

The system of indirect election prevails in Argentine, Finland and the United States, although in actual practice the American President is elected by the people. This sort of indirect election has most of the disadvantages of election by the legislature. The electors specially elected for the purpose would practically carry out the party mandates and would seldom have the choice of their own judgments or the judgement of the people. They become a close cotrie of the nature of the legislature and may be amenable to the same sort of corrupt influences. The American type which

78, Bryce : Modern Democracies : Vol-I : p, 258.

is the model of this sort of election has not come upto the expectation of the idealists who devised the system. In practice the American people have divorced their right to elect their President in favour of the party Caucus who by their dubious and questionable methods decide the election. The parties thus not only control the majority party but also the President and through the President the administration of the entire nation. The Tammany Ring and the Philadelphia Caucus officiate for the nation and who "showed themselves as unfitted to exercise the suffrage, as the lowest proletariat, by allowing their partisanship to enlist them in the support of candidates notoriously bad, who happened by control of party-machinery, to obtain the regular nominations".⁷⁹ The Caucus is the mainspring of the political parties, which is the machinery of the exploitation of the many by the few and has been characterized by eminent Jurists as an extra-constitutional hierarchy for the control of voters. And the method and results of state politics and state elections are only distorted reflections of Federal politics and Federal elections in the U. S. A., where the people have lost all volition and the party ticket decides the choice of the supreme magistrate of the nation.

But the intention of the experts who framed

79. Bryce : Modern Democracies : Vol-II : p. 116.

the American constitution was otherwise. Woodrow Wilson, himself the great war-time President of America confessed in his celebrated Book that "The party conventions, of which the constitution knows nothing, are in fact by far the most important part of the machinery of election".⁸⁰.

"The framers of the Constitution contemplated nothing like this. They committed the election of the president to a College of Electors specially elected for this sole purpose, men who, possessed of wisdom and experience and animated by pure patriotism, would be likely to select the citizen whom their impartial judgment preferred. Boards of this type were twice elected and on both occasions chose George Washington, who was the obvious and indeed the inevitable person. But the third college was elected in (1796) largely, and the fourth (1800) wholly on party lines, and *being expected to choose a party leader* acted in a partisan spirit. Their example has been followed ever since, and what was to have been a council of impartial sages *has consisted of non-entities*, a mere cogwheel in the machinery of election".⁸¹.

It is thus clear that a President, the supreme executive of a state should not be chosen as if he was a mere party leader. He should

80. W. Wilson : The State : p, 543.

81. Bryce : Ibid : Vol-II : p, 74-75.

be a real leader of the people, a distinct entity, separate from both 'the' Legislature and the Judiciary, a magistrate who would look to the interest of the meanest of men once he is elected and not look to the party, which elected him or the Caucus which espoused his cause. He should neither be a non-entity, as in France, unable to guide the ministry and the legislature. He should be the bulwark of strength to defend the common man and his country in times of national emergency and in outlining the broad principles of policy determining the major welfare of the state and should be freely elected by the people on the strength of the character which he has built up through long years of public life by devotion to God and man and need not be a mediocre influential man creeping into the chair of the Executive through the good graces of the Tammany Hall. Only in such a case would great senators like Cato the Censor, Cecero, Themistocles and Pericles, Aristides and Nicias, Abubakar and Omar, Jefferson and Lincoln whose voices are still ringing through the centuries would arise who would contest the Presidency or Khelafat, after proving their worth to the state and nation by a life-long devotion to the cause of the state and humanity. Such a character has been truly portrayed in the speech of Hazrat Abubakar, the first Khalifa of Islam on the occasion of

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his inauguration, "O People ! Now I am ruler over you, although not the best amongst you. If I do well, support me ; If I err, set me right. Follow the truth, wherein is faithfulness and eschew the false, wherein is treachery. The weakest among you shall be the strongest with me, until I have redressed his wrong, and the strongest shall be as the weakest until, Inshallah, I shall have taken from him that which he hath wrested from you. If I go beyond these bounds, I have no authority over you".

Moreover the times have completely changed. About two centuries have elapsed since the days of the American Revolution. The modern times with the convenience of Telegraph, Telephone, Television, Radio and Aeroplanes have practically annihilated time and space and made it possible for a Presidential candidate to tour throughout the length and breadth of Pakistan or America within a few days and reach his voice to the most distant villages through the radio, lay down his plans and programmes and carry the war against his adversary home to every citizen within a very short time of which the framers of the American or the French Constitution could not even dream. Therefore whatever good grounds might appear in 1789 for the indirect election of the President, have completely disappeared by

to-day and any provision of indirect election of the Executive Head of Pakistan would be a retrograde step out of gear with the trend of events of the present times.

The Governors of all the American States are elected on popular suffrage as did the Chancellors of the German Republic under the Weimer Constitution. It goes to the credit of direct popular election that, generally the Governors of American states who thus become seasoned politicians, commanding the confidence of the public, are generally elected to the Presidentship of the U. S. A.

The reaction which set in in the different states of the world against a weak parliamentary executive dependent upon the good graces of a fickle parliamentary majority gave rise to dictatorships in most of them and a strong executive in the form of a popularly elected President would on the one hand avoid the extreme irresponsible nature of dictatorships and on the other ensure a strong consistent and popular handling of the destiny of the nation, unruffled by the fear of snap votes and hasty no-confidence of the legislatures which would at most be able to check and balance the most unwanted actions of the President and keep him from rushing headlong into newfangled principles of policy without adequate ascertainment of the popular mind.

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leaving him to carry on 'the normal nation-building activities without disturbance at every turn of events. It therefore seems the most appropriate solution of the problem of selection of the Chief Executive of Pakistan as well of the federating provinces that the President or Khalifa of the Federation and the Governors of the federating states should be directly elected by the suffrage of the people for a period of 4 years, subject to re-election for another term. That in no case a President or Governor should be re-elected for the third term so that power may not be centralized in and monopolized by a single man, however virtuous or competent, for more than eight years. Very few men in the world could like the prophet of Islam, remain virtuous in the midst of the worldly allurements of power for a sufficiently long period of time. On the other hand these veteran magistrates after the expiry of the second term of power, should be nominated to the Federal Senate and be the grand Senators of Pakistan, guiding and counselling their successors from within the senate by the weight of their counsels, seasoned by the rich experience of past years as the supreme magistrates of the state. By the presence of such men of gigantic stature in the upper House of the Legislature the nation and the Legislature would gain in weight and prestige

and the people, nay the whole world would hang upon the words of such noble senators in times of national and international emergency, when every President would like to be protected by the solidarity of the nation and the counsel of the erstwhile chiefs of the nation.

THE CABINET

In such a context, it is clear that the cabinet should be appointed by and be responsible to the President and the President alone, as in the U. S. A., and the President should be responsible to the nation for every such appointment. In case of an injudicious choice or a choice not fulfilling the expectations, he can and will easily be in a position to change the incumbents without either losing any prestige or disturbance to the electorate or legislature.

In Presidential republics at present existing there are only two classes of cabinet, viz., the American type and the French or English type. In the American type the cabinet is the council of heads of departments responsible to the President, having little or no connection with the legislature. In the French or English type, the cabinet is a sub-committee of the majority party or parties in one or both the houses of the legislature and responsible not to the Executive head but to the Parliament.

The French or English ministers are generally leaders of the Parliament while the American ministers do not sit in the legislature, but they are appointed with the consent of the Senate. The doctrine of Separation of Powers was responsible for the American belief that neither the Executive should control the Legislature, nor the Legislature the Executive. The doctrine like all abstract doctrines has failed in practice, but has all the possibility of leading to a deadlock. As Bryce has pointed out "it has not prevented the exercise of extra-legal influence, for just as Congress may hamper a President (or a State Legislature its Governor) by legislation narrowly restricting the sphere of his action, so a President may put pressure on Congress, (or a Governor on his State Legislature,) by appealing to the people against them; while a President may act upon the minds of individual legislators by granting or refusing requests made to him by them for the exercise of his patronage in the way they desire".⁸².

A closer connection between the President and the Congress has been advised by many modern thinkers to obviate this difficulty in recent times. "Some urging that heads of departments be given seats in Congress; others, that they be allowed to appear and speak

82. Ibid : Vol-II : p, 23.

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82. Ibid : Vol-II : p. 23.

before it; others, that bills introduced by them be given preferential treatment".⁸³. Although these changes have not as yet been introduced in the American constitution the actual working has established a close link between the different organs of the government belying the expectation of the framers of the Constitution. As Ostrogorski pointed out the emergence of the two great political parties in America completely transformed the Federal Constitution and converted it into an almost paper Constitution. The framers of the Constitution of 1789 intended to create the three checks of the President, the Legislature and the Judiciary to counter balance one another, but after the emergence of the party system these three vital organs of the government have been completely synchronized through the party system.

The life of a nation is not logic but experience. The experience of the ages lead us to the only conclusion that absolute separation of powers is neither desirable nor practicable. The great French philosopher Montesquieu started the doctrine of the separation of powers by misreading the British Constitution, which was very aptly described by Laski as the "historic misinterpretation of the British

Constitution".⁸⁴. "The idea thus formed did not exactly represent the fact at the time", and became fundamentally poles asunder, as time passed by. But the romance of the idea caught the imagination of the idealists of the time and Alexander Hamilton adopted it and advocated the system of checks and balances in the pages of the "Federalist". Had Hamilton been alive to-day he would have shuddered to find his system of checks and balances in ruins and the double security against tyranny sealed by the ladder of party government.

In an Islamic polity, the government by parties may grow up in time but it may not also have the luxuriant growth of the Euro-American type and even the party system may not be necessary at all. Party destroys efficiency and fosters mediocrity. The party becomes the political boss which exploits the apathy of voters. The party machine of propaganda controls the political destiny of the nation through powerful agencies who dictate the voters by secret manipulation of the caucus, the mainspring of the parties.

In England also the working of the party systems have not been very happy. In times of national emergencies the great parties have accepted coalition to tide over the crises. Well known observers like Ostrogorski "after an

84. Laski : Parliamentary Government in England : p, 98-99.

exhaustive examination of parties in Great Britain and the United States were driven to propose their abolition as the only way to prevent the monstrous perversities for which they believed them to be responsible; he (Ostrogorski) felt, like Halifax at the time of their origin, 'that the best kind of party is in some sort of a conspiracy against the nation' ".⁸⁵. In no democratic country the electors vote for the leaders of one party. Indeed the idea of organizing the entire people into water-tight compartments of one or two parties cuts at the very root of democracy. Great thinkers and idealists may not subscribe to the creed of any of the major political parties. Yet to confine and bestow all the offices of state to one party alone to the exclusion of all others, is a monstrous idea, which deprives the flowers of the nation of all political power simply because the party to which they belong has got a few seats less in the legislature than the other party a margin of six and seven as in the British election of February, 1950. The English nation had a right to be served by the brilliant abilities of Churchill and Eden as well as of Atlee, Bevin and Cripps at the present moment of national emergency when the nation can and should be educated enough to expect their

85. Laski : Liberty in the Modern State : p. 74

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united abilities to concentrate on the safety and welfare of the nation. Neither the Law, nor conventions of the constitution require their permanent cleavage. The rigidity and the senseless pride of the extra-constitutional hierarchy of the party mechanism keeps the ablest men of the times at a distance from the helm of state affairs and it has twice happened in living memory in England that the discarded leaders have been subsequently hailed as saviours of the nation. Sir Stafford Cripps was expelled from the Labour Party only in recent times, to be hailed again as the most brilliant statesman. Churchill, although defeated immediately after the War has actually guided the foreign policy of England and the Labour Government of Atlee has only reluctantly followed him from a distance.

From another point of view, it may be possible that the ablest politicians of the age may not at all be members of the major political parties. They may be too big to be managed by the political parties and may be considered as dangerous men of unmanagable type. In every country it has been found that the legislature contains a few men towering above the rest, in personality and experience whom the regular parties always want to keep in the darkness for the only crime of being possessors of greater abilities. While the nation sighs for their

services, they are permanently left in the lurch by their less brilliant adversaries. So long as the state was nothing but an amorphous mass of disorganized and disconnected individuals, unbound by any other tie than that of the party-system, the omission of such versatile people from the inclusion in the Government of the day might have had some justification. But to-day, when all the nations of the world are more or less organized by other and stronger ties, the multiple party system of the French type would be the best safeguard against the tyrannies of the majority parties and their zealous-overbearing caucus which has been brought to such odium in parliamentary politics of Europe and America. But we have already examined the multiple party system of France and have found it wanting. Why? The reason is not far to seek. The multiple-party system has brought disastrous results to French public life not because of its inherent opprobriousness, but because it was inherently wedded to the monarchical system and not to the presidential or the republican system of government. In England Monarchy was gradually popularised and brought under control by divesting it of its absolute powers and vesting them in the parliament, of which the cabinet became the sub-Committee, and thus was held entitled to deliver the goods. The English Cabinet system

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was a natural growth for the last thousand years, which secured the people from the tyranny of the absolute power of kings, originally unbridled by any constitutional limitations. But the wheels of a motor car hardly fit in with the requirements of a railway carriage and the republican type of Presidential government can by no means work harmoniously with the chariot of cabinet government. The multiple-party system thus became a square peg in a round hole and it could serve neither the ideals of a parliamentary cabinet government nor those of the Presidential non-cabinet government. As pointed out by Laski, "the real function of the cabinet is to govern the country in the name of the party or parties which provide it with a majority in the House of Commons"⁸⁶ and the Executive in such a government is to be mere figure head because of its hereditary character over which the people has no control or choice.

But a Presidential system is essentially a limited and popular scheme of electing the real head of the executive instead of taking for granted a nominal one and putting him under the custody and chains of a popular assembly, which remains the sovereign law-making body supreme both over the people and also the king. In England the Parliament can pass

86. Laski : Parliamentary Government in England.

any law, even a law that "all blue eyed babies should be murdered", without the opposition of any other legislative or Judicial body, except of course the natural and inevitable rebellion of all fathers. But legally there is no body or machinery in England which can declare such a law null and void. But in the Presidential system the three checks and balances of the President, Legislature and the Judiciary would mutually checkmate and counterbalance in any such contingency. The passing of such a law by the legislature would at once be declared by the Judiciary as ultra vires and illegal and the President would never execute such a law even if passed by the legislature unless it proves its worth by the active consent of the people. This distinction recognised by all political thinkers is frequently lost sight of in actual framing of constitutions and thus the wheels of one are put into the gear of another and this give rise to a disjointed machinery of state. Bryce has fully grasped this distinction when he says "In all these equally democratic forms of government the sovereign power of the people is delegated, being in the parliamentary form delegated entirely to the legislature, in the Presidential form delegated partly to the Legislature, partly to the elected Executive and partly reserved to the people when they act

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by amending the constitution".⁸⁷.

In this context it will be absolutely clear that if instead of the Cabinet system of government in France, the Presidential system of government was introduced, the multiple party system would have been a blessing instead of a curse and the President would have been able to draw his ministers from the ablest men of all the parties with experience and command.

On the other hand the system of recruiting the American ministers from outside the legislature leads to barren results which perpetuates the theory of separation of powers, by abdicating the real power to the party caucus, an ill-devised machinery of the oligarchic type which we have already examined at length. But even in spite of the party machinery the United States President has had in recent times to forge new methods of contacting the legislatures by issuing regular message to the Congress and even by addressing the Congress in person. As pointed out by Bryce in his masterly analysis of the American government this anomaly had to be cured by successive Presidents. "The imperfect touch between the President himself and congress as a whole have come to be recognised as defects to be cured. President (Theodore) Roosevelt was more active than

87. Bryce : Modern Democracies : Vol-II p, 509,

is predecessors in pressing congress to deal with matters he deemed urgent. President Wilson went further, for he frequently addressed the congress in person. In both cases the nation showed no disapproval. There is nothing in the constitution to limit the interchange of views between the executive and the legislature. Congress has been jealous of its right, but it might well gain rather than lose by more frequent personal intercourse with the President".⁸⁸. President Wilson in his celebrated treatise on the State also hinted at this anomaly of entire blackout between the Executive and the legislature of the U. S. A. and deplored the system long before he himself was elevated to the Presidential chair. As he said "Upon financial questions, for example, the Senate or its Finance Committee must constantly wish to know the experience of the Treasury. But it is not always easy to get legislative questions fully and correctly answered; for the officers of the government are in no way responsible to either house for their official conduct. They belong to an entirely separate and independent branch of the government. Only such high crimes and misdemeanours as lay them open to impeachment expose them to the power of the houses. The Committees are therefore frequently prevented from doing their

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work of inquiry well, and the Senate has to act in the dark. Under other system of government the ministers are always present in the legislative bodies to be questioned and dealt with directly face to face".⁸⁹ The result has been that in the present times, the American President not only sends his messages to the Congress and addresses it in person and not only initiates legislations and recommends the same but actually drafts the Bills and gets it passed by the strength of his party as President Franklin Roosevelt did in his New Deal Legislation, who as some recent American writers have put it "assumed leadership in framing and pressing through Congress a programme of measures designed to overcome the economic crisis then prevailing and later formulated foreign policies respecting the aggression of the Axis powers in Europe and Asia, under which United States became involved in a Global war".⁹⁰

If Pakistan wants to gain in experience from the experiments so far made in the different democratic countries of the world it seems best that her President should select his ministers from the members of both the houses of the Federal Legislature and thus fill up the gap which is lamented by the American Jurists.

89. Wilson: The State: p. 530 (1899).

90. C. A. Beard: American Government and Politics (1947): p. 165

The ministers thus will be in a position to discuss face to face with the members of the Parliament and convince them or be convinced by them in effective debates, which carried on in their absence would be like crying in the wilderness. Moreover, the President not being responsible to the legislature need not confine his choice to the mediocrities of the majority party as the actual majority in the Legislature would have no influence or control over his duties unless he is impeached by the Parliament, in which case the Lower House would be the accuser and the Senate would sit in judgment over him. The President may therefore well take into his confidence the existence of a multiple party system, in which he can draw upon the ablest men of all the parties in the legislature and they in turn may fully inform the legislature about the position and difficulties of the Executive and thus create the long-felt spirit of harmony between the Executive and the legislature. They as heads of departments would be posted with full knowledge of the working of the executive government of the day, and as representatives of the President would be quite capable of influencing legislation which would otherwise grope in the dark as pointed out by President Wilson. And they not being dependent upon the good graces of the Parliament for their

tenure of office need not be all the time eager to satisfy party machineries with all sorts of ill-devised legislation and ill-advised patronage to maintain themselves in power. And if the worst comes to the worst and they do not pull well with the President, they would be never in fear of losing their membership of the legislature where they can fully ventilate their views on questions of policy, and gradually veer round the public opinion on their side. The recent example of Republican Turkey which was the first model constitution in Islamic countries is to the point. The President, as head of the state presides over the Grand National Assembly on ceremonial occasions and in each November, delivers a "speech from the throne". The President appoints the Prime Minister from members of the Assembly who is also called President of the Council, under Article 44 of the Constitution. The other ministers are also chosen from amongst the members of the Parliament by the President of the Council subject to the approval of the President of the Republic.⁹¹. It must however be always kept in mind that Turkey is not a Federal State and consequently she followed the English system of parliamentary sovereignty and avoided the complicated machineries of Federal America.

91. A. J. Toynbee and K. P. Kirkwood: Turkey.

The American Senate is elected for four years and one-half of its members retire every 2 years. The Australian Senate is elected for 6 years, and one-half of the members retire every 3 years. The Government of India Act 1935, enacted the election of the members of the Senate for 9 years, of whom one-third was to retire every three years, so that the Senate would be a permanent body in all the 3 states, not subject to dissolution.

So far as the powers of the two Houses are concerned both in U. S. A. and Australia both the Houses have co-equal powers, but the American Senate has certain special functions like control of appointments, and of the foreign policy of the Federation. The Australian Senate cannot turn out ministers, nor amend Finance bills like the House of Lords in England of which the Australian Senate was designed to be a mere replica. Hence in Australia which has a parliamentary system of government the Lower House practically controls bills levying taxation or appropriating money and therefore is the centre of public life like the British House of Commons. In U. S. A. where the only true type of Presidential government obtains, legislation is conducted by a system of Committees. The Senate has made itself as powerful as the popular house in respect of Money bills also. The range of its

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activities are not legislative but also executive since even appointments by the President the more important posts require its assent. The Senator is thus a real force in his own right as well as in the Senate. Every treaty made by the President requires the assent of two-thirds of its majority.

As Bryce has pointed out, the Parliamentary system is suitable to small countries or countries of moderate size and the Presidential system is best suited to the countries of bigger size.⁹³ Pakistan, being the fifth largest state in the world, is eminently fitted for a Presidential system of Government. The Senate should be composed of equal number of members from each state, small or large, as that would give sense of security to the smaller states, whereas the interest of the larger states would be adequately safeguarded in the Lower House. The terms of membership of the members of the Lower House, should be one of 4 years, co-equal with that of the President of the state, and of the Upper House one of 9 years, one-third of whose members should retire every 3 years as in the Government of India Act, 1935. The equal term of the President and the Lower House would give both a chance of getting the verdict of the people, at the same tide of events, and would allow

93. Modern Democracies, Vol-II, P, 521-22.

the President to bring definite mandates from the people. The Upper House or Senate should have the same powers and functions as the American Senate with the President of the Senate as the Vice-President of the Federation. The difference with the constitution of U. S. A. should be that the Minister of State should be chosen from the members of both the Houses for reasons described above.

The provincial or state executives and legislatures of Pakistan should be organized on the same basis as the Federal Executive or legislature with the difference that there should be no Upper House in Provincial or State legislatures. Upper Houses were introduced in some of the Indian provinces by the Government of India Act. 1935, which proved an absolute failure and went into voluntary liquidation after some time. The Upper House in the provinces or states would mean unnecessary wastage of money and futile proceedings which would merely be a clog in the machinery of popular government. The Senate in Australian States or the Legislative Councils as they are called, play only a subordinate part and have very little weight on the current politics of the day. Even agitations have arisen for their suppression from time to time and small results have been obtained at huge costs which Pakistan need hardly emulate after the failure of the

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Second chambers under the Government of India Act of 1935.

THE STATE EXECUTIVE.

The present day executive head of the Provincial governments in India and Pakistan are Governors who are appointed by the Central Executive head on the advice of the Cabinet and previously were appointed by the King of England on the advice of the British Cabinet. In America, the Executive Head of the States are elected Governors who, next to the President of the United States, attract the greatest attention and interest of the voters. In U. S. A. the state Governor elected by the popular suffrage is not only the real executive head of the state, but the future Presidents of the Republic are always chosen from amongst them. Cleveland and Franklin D. Roosevelt were Governors of New York, McKinley was Governor of Ohio, and Woodrow Wilson was Governor of New Jersey, and made their abilities and personalities known to the nation before they were elevated to the Presidency of the Republic.

The position of the State Governors in U. S. A. is peculiar to the American constitution in which the theory of separation of powers precludes even the harmonious co-operation among the various departments. w p

in the Parliamentary Cabinet. Of course, here also the great political parties have tried to synchronise the activities of the different departments by extra-constitutional devices. "This form of antagonism is often more marked when the governor represents one party and his immediate associates represent the opposition. As if to atone for the severe restraints placed upon the Governor's administrative authority, several states authorise him to make special enquiries into the working of the various executive departments".⁹⁴. As we have already discussed above, these defects both in the Federal and State Constitutions of the U. S. A. arise from the fact that in the first flush of jubilation over the liberation of America from the yoke of British masters, the idealistic temperament of the great leaders of the American Revolution like Thomas Paine, Jefferson, and others wanted to cut adrift completely from everything English which reminded them of the hateful foreign yoke that was no more, and wedded themselves to the charming but unchartered ideas of the coming French Revolution which sang the siren songs of equality, fraternity, liberty and separation of powers from the beautiful land of France on the other side of the Atlantic. The children of France like Rousseau and Montesquieu dreamt that the

94. Beard : American Government and Politics. p. 632.

poetic but unexplored abstract ideas of equality of man and separation of powers would secure that equality in actual practice and America was the first country in the world to apply them in the actual drafting of a great Constitution. The result was that the application of abstract, untested ideas to a practical system of government left huge gaps between the different parts of the Executive machinery of the state which are constantly being remoulded in practice even in our days through extra-constitutional devices. In 1931 the State of Wisconsin set up a Board of Public affairs, to fill up the void in the administration of the finances of the state, composed of the Governor, Secretary of state, representatives from the legislature and citizens appointed by the Governor with the approval of the Senate.⁹⁵. Similar devices have been adopted in other states also. The recent authorities on American Constitution have all agreed that the Original idealistic and un-practical bent of mind of American statesmen who drafted the constitution, have given way to a new concept of a balanced system of administration in which public interest plays the most prominent part. As Munro has recorded this new change "So the old line of demarcation between the two sets of governmental powers is being gradually moved upward. The country

95. Ibid : p. 633.

is drifting in that direction slowly but steadily. For good or ill we are relaxing the emphasis on federalism, state sovereignty, states' rights, and local self-determination, in favour of nationalism, national policy, and centralized power".⁹⁶.

After a trial of the ideas of the French Revolution for 200 years, after other great revolutions in human history within this time, the framers of the Pakistan Constitution are happily not labouring under the same delusions as their American predecessors. In fact the principles of Islam which have been declared by them to be their main idealistic formulary, the sheet anchor and ethical basis of their philosophy are already a well-discussed and well-codified system thirteen hundred years old which have no dogmatism of a newly propagated system. The method of secular government under the Prophet and the first four Khalifas had no dogmatism or theoretical basis in them but was a simple plan of the governance of a State in which common sense had the foremost priority after the definite recommendations of the Kor'an and the Sunnah, and this doctrine of the common sense is the Magna Charta of the Islamic Jurisprudence. The discourse of the Prophet to Mu'aj Ibn-e-Jabal, Chief Justice of Yaman at the time of the latter's appointment.

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clearly laid down the truth of the above as set forth by Shabrastani, Sijistani and Tirmeji.⁹⁷.

Prophet :—"How wilt thou decide when a question arises ?"

Muaj :—"According to the Book of Allah".

Prophet :—"And if thou findest no guidance therein ?"

Muaj :—"According to the Sunna of the Messenger of Allah".

Prophet :—"And if thou findest naught therein ?"

Muaj :—"Then shall I apply my own reasoning."

Prophet :—"Praise be to God, who guides the messenger of His Prophet in what He pleases".

The Pakistani Statesmen are therefore not to brand everything English or Russian, French or German, as anti-Christ or anti-Islam, but are to weigh all the systems in their reason and select the best tracts of all systems to build up their constitution in the light of the guidance of the Prophet and Kholafa-c-Rashidin. It therefore stands to reason that the mistakes of the American constitution should be discarded and the President of the Federation and Governors of the states be made not only the executive heads but also the legislative

97. Tyabji : Principles of Muhammadan Law : p, 23, also, Hitty : History of the Arabs : p, 397.

heads of their respective territories under the limitations of the Laws of the Constitution. The Governors of the Provinces or states would thus have to choose their ministers from the unicameral legislatures as we have already indicated above and the President of the Republic would have to choose his ministers from both the houses of the Federal Legislature and thus synchronize the activities of the Executive and the Legislatures in the light of the American experiences.

QUALIFICATIONS, POWERS AND FUNCTIONS Of The President And The Governors

The question of the qualifications, powers and functions of the President or Khalifa is one of the important and vexed questions of Constitutional Law. But from a dispassionate study of the precedents that have been established both in the Islamic traditions (Sunna) and in the Democratic traditions of Europe and Asia, a consensus of opinion is discovered verging upon unanimity which happily portrays the ultimate oneness of the individual mind. On further analysis it completely establishes the truth that the Islamic Khilafat is not an office of spiritual leadership. It is a secular office of the performance of certain definite functions of administration and government, the qualifications requisite for which can hardly be inherited

and transmitted from father to son and so on in the same family line, but are things to be acquired by a life-long devotion, study and selfless, tireless pursuit of the knowledge of those arts and sciences which go to make up a great statesman. There is very little to choose between the greatest leaders of every nation who have left an indelible mark on the sands of time and all of them had the same self-acquired qualities of devotion and energy to public good so that they became heroes not only of their own nations but of all humanity. But out of all those statesmen of the first rank the world has yet produced, the first two Khalifas of Islam, Abu Bakar and Omar stand out as the two greatest men of all times in comparison with whom, the rest of the world of statesmen and politicians look pale and wanting. The reason is that before the Prophet of Islam left this mortal world, he left behind him such ideas of public services, ideas of deeming all authority as a sacred trust from God, idea of treating every copper in the Treasury as the property of the subject in trust with the government the touching of which would tantamount to both the greatest sin against God and the highest crime against the state, ideas of treating the Khalifa as the first servant of the state, a servant, the fitness and holyness of whose character should be an example to the world, ideas

which still the world is a far way off to grasp and to comprehend. The framers of the constitution of Pakistan would do well to have those ideas in front of them to perform properly their noble task and set an example to the world.

The Muslim Jurisconsults laid down four qualifications necessary for the condidateship of the Caliphate, viz. :—

1. Knowledge.
2. Justice,
3. Capacity or competence, and
4. The power to exercise the senses and limbs which reflect the activities of mind and body.⁹³.

There is hardly any necessity to dilate very much on the four conditions stated above. They imply nothing but that the head of the State must have a complete knowledge of the world and of his own state and the politico-social, economic and military situation at home and abroad. The knowledge must also be supplemented by the desire to see justice done between man and man and to execute the laws of the state evenly and impartially without fear of favour, so that the apprehension of Montesquieu that "If legislative and executive

93. Guilanme : *The Traditions of Islam* (Oxford, 1924) p. 160.
See also Amir Ali : *Spirit of Islam*, Chapter on Apostolic succession, Ch. X, p. 125

powers are united in the same person, or even in the same body of magistrates, there is no liberty, because people are afraid that the monarch or the senate may make tyrannical laws in order to administer them tyrannically"⁹⁹ may not come true.

Therefore the problem of the selection of the supreme magistrates of the state has been one of supreme importance in all the states of the world. The framers of the American Constitution expected that the post of the President of the U. S. A. would always be filled by the men of the highest calibre and capacity in the state which has hardly been fulfilled. In 1788 Hamilton, one of the geniuses behind the American constitution predicted "the office of President will seldom fall to the lot of any one who is not in an eminent degree endowed with the requisite qualifications * * * * It will not be too strong to say that there will be a constant probability of seeing the station filled by characters pre-eminent for ability and virtue".¹⁰⁰.

The prediction of Hamilton was hardly fulfilled. Hamilton himself along with other luminaries of the American public life like Marshall, Webster, Calhoun had to give up the banner in the hands of unknown men, who

99. Montesquieu : Spirit of the Laws : XI : 6.

100. Munro : Ibid : p, 161.

have left no remembrance of themselves behind them except on the roll of Presidents. Lord Bryce writing about 150 years after Hamilton asked the question in a notable chapter as to "Why Great Men Are Not Chosen Presidents". "Since the heroes of the Revolution died out with Jefferson, Adams and Madison, no person except General Grant has reached the chair whose name would have been remembered had he not been President, and no President except Abraham Lincoln has displayed rare or striking qualities in the Chair".¹⁰¹.

In his later Book Bryce defined certain qualifications which the Presidents ought to possess. They are:—

1. Strong Personality, a Man.
2. Courage and Energy.
3. Intellectual Power, cleverness, Command over language.
4. Honesty and a reputation for Honesty.
5. Geniality—the sympathetic man.
6. Experience in handling parliamentary and state affairs.
7. Capacity to carry the nation to personify it.¹⁰².

The analysis of Lord Bryce, thirteen hundred years after the similar analysis of the Muslim

101. Bryce : American Commonwealth Vol. I, Chap. VII.

102. Bryce : Modern Democracies, Vol. II : Ch. XII

Jurisconsults would show that for all practical purposes both of them are the same and requires a high degree of character and capacity for the Supreme magistracy of a state. A high degree of religious training, education and life devoted to public good and parliamentary practice and procedure, would be requisites for every candidate for holding such a high office. In other words to be fit for the Caliphate, one must also be fit for the Imamate, so that he may be able to discharge the duties of the Presidency to the satisfaction of the world. Membership of the national Parliament in the earlier years of the political life and Governorship of the Provinces or states in subsequent years would be the proper training ground of the future Presidents and a deep study and practice of the rules of human conduct as laid down in the Quoran and the Sunna would mature their abilities for the higher call to the Presidentship of the Federation of Pakistan.

The functions of the President of an Islamic state is more or less similar to those of the American President. The American President is the Commander-in-Chief of the American Forces and can take his own initiative. In the Mexican war President Polk moved his forces in the Mexican territory and in 1941 President Roosevelt on his own initiative moved the Army to Iceland. It seems, President Taft

also followed the same line of action in the battle of Korea.

The Khalifa in the Islamic dispensation was also the Amir-ul-Mu'menin, the Commander of the faithful, from the very time of the first Caliphs. "The title Amir-ul-Mu'minin was adapted from one used of the army leaders, so that when one of the companions hailed Umar as Amir-ul-Mu'minin, the title was generally approved and adopted. Since then the title has been inherited by succeeding Caliphs".¹⁰⁸. Of course the President of Pakistan would in our age be the head of the Army, Navy and Air Forces, the same as in America. Under Article 40 of the constitution of the Turkish Republic, the supreme command of the Army vests in the President representing the Grand National Assembly.

The next important function and power of the President would be the appointment of the Chief Judges of the State. Under the first Khelafat the dispensing of Justice was considered to be a religious duty of the state inspired by the following verse of the Quoran I

"God doth command you
To render back your Trusts
To those whom they are due
And when Ye judge between men and man
That Ye judge with justice :

Verily how excellent is the teaching :
 He giveth you !
 For God is He.
 Who hearth and seeth all things".¹⁰⁴.

We have seen the Holy Prophet himself appointed Justices during his life time. Naturally the office of the Kazi was subject to the Khalifa. "His office is to apply the decisions and principles of the sacred book and the sunna to the settlement of all disputes and actions between litigants. Originally this office was filled by the Caliph himself. Umar first delegated it to another. The functions of the Quadi have been enlarged so as to include the administration of the affairs of the insane, orphans, bankrupts, the testamentary disposition of Muslims, pious benefactions, and so on. Formerly the Quadi was charged with the righting of wrongs-a function which requires the strong hand of the magistrate to enforce its decrees. Upto Al Muhtadi, the Caliphs exercised this function themselves, though sometimes they delegated it to their Qadis".¹⁰⁵ Under the Abbaside Khalifas the Kazi of Bagdad was the Chief Justice and under him there were regional Kazis, all of whom were selected from the Faquih, the learned in the Law of Islam. Imam Abu Hanifa was offered

104. Quoran : S. IV. 58.

105. Guilanme : The Traditions of Islam : p. 165-66.

the office of the First Chief Justice of Bagdad who preferred imprisonment to the acceptance of the post as he preferred to remain a Mujtahid than become the Kazi-ul-Kuzzat or Chief Justice of the State. His disciple Abu Yusuf accepted the post. The Provincial Judges held their appointments from Governors and the Chief Justice from the Khalifa himself. The Judges of the First Class had practically the same powers as at present enjoyed by the District Judges in Pakistan and India. He was the Guardian of the Orphans just as under the Guardians & Wards Act of India, as also for lunatics and minors. He was also the administrator-General of Trusts and Religious and pious foundations and in deciding a certain class of cases.¹⁰⁰

The practice varied somewhat under the Moghul Rule in India. As described by Sir Jadunath Sarkar "The Emperor, as the "Khalif of the Age," was theoretically the highest Judge and used to hold Courts of Justice and try select cases personally on Wednesdays. But the Court held by him was a tribunal of the highest appeal rather than a court of first instance. The Quazi was the Chief Judge in criminal suits and tried them according to Muslim Law. * * * * The supreme Quazi of the empire was called the Quazi-ul-Quazzat

100 *ibid* p. 326.

and also 'The Quazi of the imperial .. and he always accompanied the Emper. Every city and even large villages had its lo Quazi, who was appointed by the Chi Quazi.¹⁰⁷. The Chief Justice himself was course appointed by the Emperor as Khali of the Age.

The Moghul administartion of Justice w almost akin in theory to the English syste in which the King was the Supreme Judge and the word "Court" implies the Court of the King which dispenses Justice. The King, from the Chief Judge, became gradually the Head of the Judiciary without any function, all the Judicial functions being performed by his Chancellors. But the king on his own authority appointed the Chancellors and Chief Justices of England, which later on he did on the advice of his ministres upto 1701 A. D. The Judges in England were appointed and dismissed at the pleasure of the King and therefore were necessarily subservient to the interests of their master. The Act of settlement of 1701 finally provided for the independence of the Judiciary by securing them proper salaries and permanence of service, and abolished the practice of dismissing Judges for giving verdicts

107. Sarkar : Moghul Administration.

adverse to the Crown, which had been so common under the Stuarts. Under the Act of 1701 thus the Judges in England became irremovable unless they were convicted of a criminal charge or both the Houses of Parliament submitted an address for their removal to the King. So long as they gave judgment according to law they were independent of fear from either the king or his people.

During the later Caliphs, as well as under the Moghuls the appointment and removal of Judges became the subject of the most corrupt influences. It is on record that Ibn-e-Khalidun, who was appointed the Justice at Cairo obtained six successive appointments and dismissals dependent upon his influence with the Sultan, the last dismissal occurring only a few months before his death in 807 A. H. As Sarkar says "the Quazi's department became a by-word and a reproach in Mughal times".¹⁰⁸

Article II S. 2.2, of the constitution of the U. S. A. provides for the appointment of the Judges, along with ambassadors, consuls and ministers and other high officers of the state subject to the consent of the Senate and when the Senate is dominated by the President's party, the President practically becomes the

108 M. A. Enan Ibn Khalidun, also J. N. Sarkar Moghul Administration

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sole appointing authority. As Bryce has just remarked that "the place assigned to the Judiciary by the Constitution has turned out to be greater than the founders foresaw". In interpreting the constitution they become the embodiment of the Spirit of freedom "the living voice of the people".¹⁰⁹. They are always men of high character and integrity and have never let down the State.

It is now practically an established Principle of Government that the Superior Judges should all be appointed by the Head of the State in consultation with the Cabinet or the Senate as the case may be from amongst the most meritorious, learned, scholarly and experienced members of the legal luminaries of the country and they should hold office subject to good behaviour upto the age of retirement on a salary which can draw the men of the superior calibre. They should be immune from all fear or favour after their appointment and should be able to set the highest standard of judicial decisions. They should also be vested with complete control over the subordinate Judiciary which in British India was more a part of the Executive machinery of the State than of Judiciary proper. Pakistan, as a True Islamic

109. Bryce ; Modern Democracies, Vol, II, p. 91.

state would have to cut herself off completely from the old moorings of the British bureaucratic system of administration which was more or less a system specially devised for ruling over a foreign people than one of government of the people, by the people, for the benefit of the people.

THE JUDICIARY

The importance of the absolute independence of the Judiciary in every democratic modern state is vital, but in Federal state it is all the more so. Montesquieu was the first great philosopher who preached the doctrine in his "Spirit of the Laws" which ever since has been one of the guiding principles of all constitution-markers of the world. "There is no liberty, again" said he "if the Judicial power is not separated from the legislative and executive if it is joined to the legislative power, the life and death of the citizens may be arbitrarily disposed of, for the judge will be the legislator; if it is joined to the Executive power, the judge may have force of an oppressor".¹¹⁰. The theory of Montesquieu, if a little impractical, so far as the absolute separation of the Executive and the Legislature is concerned, is most

110 Montesquieu, *Ibid.*

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practical and desirable so far as the separat of Judiciary from the other two organs of government is concerned. The separation the Judiciary secures its independence, guarantee purity of Justice, safeguards the liberty of citizens but in no way weakens the government but rather strengthens it, because Justice cements unity, discipline and fellow-feeling of man.

Although we have seen the Maghul Administration in India failed to uphold the absolute impartiality and independence of the Judiciary, the rules framed for guidance of the Judiciary were absolutely free from any just reproach: "Be just, be honest, be impartial. Hold trials in the presence of the parties and at the court-house and the seat of Government (Mahakuma = Subdivisional Hd. Quarter). Do not accept presents from the people of the place where you serve, nor attended entertainments, given by any body and every body. Write your decrees, sale-deeds, mortgage-bond and other legal documents very carefully, so that learned men may not pick holes in them and bring you to shame."

"Know poverty (faqr) to be your glory (fakhr)"¹¹¹ were the rules for the guidance

III. Manual Of officers 'Duties; pp. 43-44, See Sarkar: Moghul Administration.

of the Judges all over the great empire of Hindusthan under the Grand Moghuls, in the light of the unique teachings of the Quoran:

"And do not eat up your property
Amongst yourselves for vanity,
Nor use it as bait for the Judges
With intent that ye may
Eat up wrongfully and knowingly
A little of other people's property."¹¹²

"And the firmament has He raised high
And he has set up
The balance of Justice
In order that ye may not
Transgress due balance."¹¹³

Akbar the Great Moghul, following the principles of the Quoran, said "If I were guilty of an unjust act, I would rise in Judgment against myself."¹¹⁴ The saying portrayed the feeling of the great emperor that nothing but justice can be the foundation of the state and the stability of the state, the peace and progress of the state depends solely upon whether the subjects are assured of impartial justice and whether the Judiciary is competent enough to discharge it. Tyranny raises its head when justice flies in the wilderness. The

112. Quoran : S. 11, 188.

113. Ibid : S IV. 7.

114. Ain-e-Akbari- (Blockman) Vol III p 387.

great French Revolution, that great human calamity that darkened the face of Europe arose out of the denial of Justice to the common man. As the author of the French Revolution records most truthfully the ideas of the Revolution were mainly the product of miscarriage of Justice :—

“Liberty and Equality are dreams : Justice is something which even the slave, even the prisoner at the bar, expects. To Frenchmen in '89 justice seemed the most important part of good Government. There is nothing about which the *capias* are so unanimous as the need for judicial reform. When they speak, as they constantly do, of a single law for the whole country under which abuses of authority will be impossible, they are thinking chiefly of a civil and criminal code to put an end to the cruelties and injustice of the old courts. No educated Frenchman was ignorant of the judicial scandals connected with the name of Calas. Sirvan and La Barre, to which Voltaire had devoted fourteen of his most devastating pamphlets. Prizes had been offered for essays on judicial reform by respectable Academies and had been competed for by Robespierre and Marat. * * * * Legal appointments were valued not for the legitimate fees they carried

with them, but for the opportunities they offered of illegitimate pickings and perquisites. In almost every case brought before the Courts it was necessary to bribe the Judges, and the verdict went to the client who bribed most. An agent of the East India Company trying to extract trading concessions from a native potentate (in India) was in no worse position than a land-owner seeking to establish his title to property before the Paris Parlement."¹¹⁵

In fact the entire idea behind a Written Constitution and democratic form of Government is to secure justice. Powers of all the organs of Government must be limited so that there may not be injustice. All actions of the officers of the Government must be subjected to the constant and vigilant scrutiny of the Courts of law, so there may not be injustice. And the Courts must not be subjected to interference of any outside forces to curb their independence to avoid injustice. That is why the Preamble to the constitution of the U. S. A. opened with the following words: "We the People of the United States, in order to form a more perfect Union, *Establish justice, insure domestic tranquillity.*

115 Thomson : The French Revolution : p. 131-134.

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provide for the common defence, promote the general welfare and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America."

The three great Philosophers of the French Revolution, Voltaire, Rousseau and Montesquieu, all devoted their whole thought in quest of Justice, in the reaffirmation of human rights. "Mankind having lost its rights," said Voltaire, and "M. De. Montesquieu has come to find them again."¹¹⁶ "What occasion is there to discuss," exclaimed Gregoire in the Convention on September 21st, 1792, "when every one is of the same opinion? Courts are the workshops of crime, the furnace of corruption. Since we are all equally impressed with these truths, what need of discussion?"¹¹⁷ "Nature," "Reason," "Justice" were the war-cry of the people, who had been denied justice for centuries, nay for a thousand years and the whole people of France bathed themselves and slaked their thirst in the blood of the Revolution, as if in atonement for all the accumulated injustice and tyranny of centuries.

These and similar ideas inevitably and naturally arise in delineating the contours of the

¹¹⁶, The Historians' History of the World, Vol. XII, p. 115.

¹¹⁷. Ibid ; p. 282,

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future Judiciary of Pakistan. The principles of Islam lay down emphatically that :—

(i) Judges must be above any influence of the Executive or the Legislature, their only guide being the Quoran and the Sunna and the subsequent Precedents established in Courts of Law as would appear from the advice of the Holy Prophet to Jabal.

(ii) Judges must be above bribery and corruption. —Quoran S. II : 188.

(iii) Judges must be spiritually fit and proper persons to qualify as such, must not be given to a show of wealth, so that "faqr" may be their "fakhr".

(iv) Judges must be recruited from learned and experienced men, versed in that particular branch of law in which they would have to adjudicate, so that learned men may not pick holes their awards for clumsiness and incompetence.

(v) The present relationship between the civil service and the Judiciary must be completely severed. The Magistracy which is nothing but a body of paid servants and subordinates of ministers and other Executive Heads of the State should atonce be divested of all judicial functions so that the same men may not continue to judge and enforce the law. The dispensing of civil

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and criminal justice must all be subordinated to the highest Judiciary alone whose members should inevitably be appointed by the Head of the Federal State subject to good behaviour, irremovable by any ordinary tribunal.

(vi) Justice must be made available to the strongest as well as the lowliest of the low. The rightful criticism that "the state has left in the hands of the lawyer its responsibility for ensuring that Justice shall not be a commodity available only to those who can afford to pay heavily. There is a public prosecutor, but no Public defender".¹¹⁸ If justice is not made available to every wronged man, the existence of Justice is immaterial. The present system of Pauper suits is hardly of any use to the people who respect this institution by ignoring it. One sympathetic writer said "The unfortunate litigant who is neither rich nor so poor as to qualify for aid as a poor person may risk everything when the machinery of the law is set in motion for or against him and many cases are settled, perhaps on terms unfair to the weaker party, which under a reformed system might be equitably tried out before the Courts."¹¹⁹ The state must therefore have

118. Greaves : *The British Constitution* : p. 217.

119. *Political Quarterly*, 1933, p. 162. *Ibid* p. 217-18.

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its own public prosecutors as well as public defenders so that no man should go undefended before law.

(vii) Law must not be expensive and delatory. The English Jurisprudence laid down the dictum "delay defeats equity." Bernier quotes a saying prevalent in India during the Moghul administration that "speedy injustice is preferable to tardy justice" (Na-haqqi kutah bihtar az haqqi diraz).¹²⁰ As Bernier confessed "protracted law-suits are, I admit, insupportable evils in any state and it is incumbent upon a sovereign to provide a remedy against them." The Government of Pakistan would be well advised to review the entire system of Judicial administration prevalent at the present moment in Pakistan to make justice easily available, cheap, and speedy, to the common man.

(viii) The Judiciary in Pakistan must be ultimately responsible for the protection of the Constitution, advising the Government on points referred to it for decision and finally interpret the principles of the Quoran and Sunna. The liberty of the people can be preserved, enlarged and developed only by a Judiciary jealously guarding the rights of the

120. Bernier : Travels in the Moghul Empire, p 236.

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people from encroachment by any person group or any department of the Governme
In the famous Marbury-v-Madison case 1803, Chief Justice Marshall of the Unit+ States finally laid down that the Supre Court, under the constitution possessed th power to declare the Federal Statutes voi when they conflict with the Fundamenta. Laws. The Federal Court of Pakistan must also possess similar powers to declare federal laws void when repugnant to the Rulings of the Quoran, the Sunna and the Fundamental Laws of the Constitution of Pakistan.

Two matters require the special attention of the framers of the Constitution. The first is to secure the separation of the Judiciary from the other branches of the Government so as not to make Judiciary subservient to the whims of the Executive. Government properly so called *is one of law, not of men* said John Adams, and men must not be allowed to interfere with the course of social justice. In our days criminal justice is practically a handmaid of the Civil Service which is the right hand of the Executive. The Civil Service even successfully invaded the High Court Benches and seasoned civil servants would suddenly find themselves elevated to

the High Court to take their seats as legal luminaries of the day. Under the Government of India Act of 1935 a civil servant of only 3 years standing as a puisne Judge was eligible to be the Chief Justice of the High Court. Thus with the Secretary of state for India as the head of the Civil Service, the above system completed his hegemony over the Viceroy, his legislature and the Judiciary to secure the administration of "British" Justice. The result was necessarily the most disastrous that could be imagined. The observations of two English Judges, Derbyshire C. J. and Lodge, J (The present Chief Justice of Assam) in *Khan Saheb Hatemali-v-king Emperor*¹²¹ as cited below would prove the nature of executive interference in judicial matters prevalent in our time, which if discovered once has remained undiscovered a thousand times. "For Government Departments to suggest to the District Magistrate by private letters what he and the trying Magistrate should do in cases under trial is altogether wrong and such attempted interference with the course of justice is inconsistent with the oaths of office which the Governor and the Ministers have taken. ("to do right to all

121. 49 Calcutta weekly Notes : p. 574.

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manner of persons according to the laws and usages of India without fear or favour,") does not take place. Further it is not consistent with the duties of Secretaries Government Departments who are officers subordinate to the Governor for the purpose of exercising the Executive Authority of the province to take part in such attempts. * * * I have come to the conclusion that an attempt was made to hold up this prosecution so that eventually it would be dropped. Clearly the accused had moved in this matter and had friends with influence who caused the Government Department to send the above letters?" It is therefore incumbent that in the constitution of Pakistan the Judiciary must be absolutely separated from the Civil Service, and the channels of interference with popular justice be completely closed so that there may not be one type of justice for the poor and another for the rich and influential landgraves and margraves who can afford to purchase influence at the Courts.

The second matter of importance is that Judges must not be recruited from politicians who have been outspoken in their defence of particular political programmes. Such politician Judges would bring the political controversies in the streets to their seat of Judgment and

lower the bench in the estimation of man. The conflict between the New Deal Legislation of President Roosevelt and the Supreme Court resulted in such appointments. As Laski has put it "The Judge whose promotion is dependent upon the will of the executive, even more the Judge who may be look to a political career as a source of future distinction, neither of these is adequately protected in that independence of mind which is the pivot of his function. No less a person than Mr. Chief Justice Taft has told us that he appointed a predecessor to that eminent position at least partly because he approved of one of his decision."¹²² Thus appointment and promotion to the Bench if dependent upon political opinions or likings of the President and the Executive would spell disaster to the Judicial machinery, if not in the short run, at-least in the long run. President Roosevelt appointed all Judges of the Supreme Court of America from the supporters of his New Deal measures, as a sequel to his defeat on the reorganization plan. "Senator Black, Stanley Reed, Felix Frankfurter, William O. Douglas, Frank Murphy, Robert H. Jackson and Wiley Rutledge, all Democrats of the New Deal

122. Laski: *Liberty in the Modern State*: p. 69.

persuasion had been appointed by President Roosevelt. Not without justification was it said that President Roosevelt had lost the battle but won the war."¹²³ The proper course to be adopted by President Roosevelt would have been to amend the Constitution by changing the clauses which offended against the New Deal legislation and not by sending his partymen to the Supreme Court one after another, thus by influencing justice indirectly which he had no right to do directly, as suggested by Alfred M. Landon, the Republican Candidate.

THE MENACE OF ADMINISTRATIVE LAW.

The last point with regard to the function of the Judiciary which requires the pointed attention of our legislators is about the rapid growth of the menace of the Administrative Law in Pakistan in recent times. The plethora of new regulations absolutely discretionary with administrative bodies in the matters of Income Tax, Sales Tax, Raw Jute taxation, electrical utilities etc. touchnig intimately the daily lives of millions of our poor businessmen, incapable of fighting the issues to the last at

123. Beard : Americal Government and politics : p, 228.

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the huge cost of money, time and energy are eating into the vitals of the nation and sapping at the very root of the growth of business, trade and industry in the infant state of Pakistan. In most cases it is found that the law creating these administrative tribunals contain a most innocent clause to the effect "The decision of the body shall be final," which, in effect perpetuates tyranny by inexperienced Junior Civil Service men who if honest decide cases with an eye to their own promotion, and if dishonest, with the sole aim of personal gratification. The administrative appellate authorities in the hurry of their multifarious executive functions take the decision of their subordinate officers as gospel truth and summarily dispose of the appeals without any regard to the merits of the case or the principles of law on the subject. In England and America these matters have already attracted a great deal of public attention and discussion and have to some extent been partially remedied, though much yet remains to be desired. Lord Hewart, the Lord Chief Justice of England discussed this menace ably in his "New Despotism," which was adversely criticized by Laski.¹²⁴ Of course, in England, where the spirit of Justice

124 Laski Parliamentary Government in England P. 358-70

has grown for a thousand years uninterruptedly, there might not be much cause for panic over the growth of administrative law but a person with post-war experience in India and Pakistan would like agree more with Lord Hewert and his school than with Prof. Laski. In America also these apprehensions have been widely felt and as pointed out by Prof. Beard "Recently there has grown up a demand for freedom of appeal to the regular courts against the decisions of administrative agencies which have regulatory or semi-judicial powers. The Supreme Court has shown some sympathy with the idea."¹²⁵. Munro has on the other hand drawn our attention to the position that "One should remember that there is nothing dangerous about a government of men so long as it is a government of men controlled by law. So long as the administrative authorities are required to keep within the boundaries set for them by legislative enactment, the danger of bureaucratic autocracy is small."¹²⁶. But that is merely begging the question. Who is to determine whether the poor man suddenly assessed a tax of Rs. 789/- by an Administrative Tribunal has been assessed rightly within the boundaries set by law, unless he can come to

¹²⁵. Beard : *Ibid* : pp. 245-46.

¹²⁶. Munro : *Ibid* : p. 527.

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the ordinary Civil Court without much loss of time and money. And a delatory and circuitous route which may give him the questionable right of appeal to a final court of law is as good as non-existent for him if he is to spend double the amount to get a possible redress. Those lawyers who have got the experience of the proceedings of the Administrative Courts of Pakistan in the post-war period would amply bear with the critics of the menace of Administrative law. For example, under the recent Compulsory levy of Foodgrains Order in Eastern Pakistan, the assessing Officers' final list prepared and finally published by him, possibly and most probably without having any idea of the locality and the true position of the parties, were final, subject to a possible revision by Controllers of Procurement on the ground of hardship. While there was no further appeal to the ordinary courts against the decision of these bodies, and ever no records of such decisions, the failure to comply with the orders of those tribunals were appealable to the ordinary appellate criminal court or the Sessions Court, who invariably dismissed the appeals summarily on the ground that the decision of the appellate authority from the original authority was final and hence its violation to be invariably attended

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Civil Court to the disgrace and if necessary dismissal of such officers for decisions which have no legal basis. Eternal vigilance is the price which we pay for our liberty and the vigil, the lifelong and arduous vigil can hardly be kept by the individual over the tyranny of the executive without the support of the powerful hands of the ordinary courts of law of the land, and thus successfully fight the rising menace of administrative law which is likely to grow more with the ever-increasing complexity of the machinery of the state in our times.

REMOVALS FROM OFFICE.

Removal of officers from office for certain gross offences and other serious charges is one of the fundamental rights in every democratic Government. We have already quoted the inaugural speech of Hazarat Abubakar the first Khalifa of Islam which clearly laid down the principle once for all that even if the Khalifa himself would be guilty of any gross breach of the trust reposed in him, he would be liable to removal at once. "Obey me only so far I obey God and His apostle. If I go beyond these bounds, I have no authority over you". This clear and bold enunciation of the principle

of Removal of the Chief Executive of the State thirteen hundred years ago has in practice been accepted by all democratic governments in modern times. Even in Royalist England where the king can do no wrong and the king cannot be legally removed, the extra-constitutional device of abdication of the King was enforced in the case of Edward VIII. who offended against the moral sense of the English people. The President of the United States is liable to be impeached before the Senate for any such charge and if the charge is brought home he is liable to be removed. President Andrew Johnson was impeached but he was not convicted, escaping by one vote and in the next election he did not stand for Presidentship. However much disagreeable may the procedure be that is the only way of getting rid of the President, the Federal Judges who hold Office during good behaviour and cabinet members whom the President wants to retain and the institution of impeachment has not been abused in America. The Islamic principle as laid down by the first Khalifa is plainly in support of the principle of impeachment because unless a proper charge is brought before a proper tribunal and established to the hilt, not by a bare majority but by at least two-thirds majority, to indicate clearly

the mind of the nation, any such removal would not be proper and dignified.

We have seen that in the interest of efficient administration in a modern democratic country absolute separation of powers is not only impossible but also undesirable, "Save in the realm of pure theory."¹²⁷ The growth of public opinion in modern times has of course a tendency to check all the departments of administration in wantonly sacrificing public utility to private gain or whimsical discharge of public duty. All enlightened people would readily agree with Lord Bryce that "there is no better test of the excellence of a popular Government than the strength of public opinion as a ruling power."¹²⁸ But as regards the Finding of Bryce on the quality of Public opinion in America, viz., "In the United States, though votings are more frequently than in any other country, yet Public Opinion is, more fully than elsewhere, the ruling power," the unhappy legislators of Pakistan would sigh with regret that they could hold the same view with regard to the nature and quality of Public Opinion in Pakistan or in any of the present

127. Beard : *Ibid* ; p 13.

128. Bryce ; *Modern Democracies*, vol. II. 121.

day Muslim states of the world. 'The Public is generally a hydra-headed monster and unless it is as a whole tamed, moralised and spiritualised to a considerably high standard public opinion would neither be public nor opinion worth a penny. John Stuart Mill, the most celebrated protagonist of government by Public Opinion, pointed out long ago that "The public at large remain without information and without interest on all the greater matters of practice; or, if they have any knowledge of them, it is but a dilettante knowledge, like that which people have of the mechanical arts who have never handled a tool. Nor is it only in their intelligence that they suffer. Their moral capacities are equally stunted."¹²⁹ What was true in England in Mill's time is more true to-day in our country. Bryce himself has admitted the tendency of public opinion to be born away by a sudden gust of excitement at the advent of every new-fangled proposition if it has sufficient money and propaganda behind it and to silence all voices of opposition it does not like to hear. Given a popular demagogue with a good training in the art of persuasion, a powerful purse and the over-powerful support of vested interests

129. Mill : Representative Government ; [Oxford] p. 185.

Arabs to maintain the most democratic principles of Islamic polity immune for long from the onslaught of the tyranny of despots which overwhelmed the Islamic world. In England the democratic tradition took a thousand years to gradually give rise to some sort of Stable public opinion which even to-day is a weak amorphous mass of sentiments although highly developed. Its junior branch took deep roots in America, which was nourished for 200 years by its isolation and geographical position fed by streams of enlightened principles of European thought undisturbed by the vicious influences of feudalism, religious intolerance and power politics of the ancient world. So long as the public opinion of Pakistan is not developed by continuous freedom of thought and discussion, fed by mass education of a wholesome type and seasoned with the moral and spiritual awakening of a considerable number of years, the checks and balances of the constitution and the rigorous discipline of the Quoranic ideals, would be anxiously embraced by the people of Pakistan for the safeguard of their rights and liberties from encroachment at the hands of tyranny of men, groups and institution of powerful nature.

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INTERNATIONAL TRIBUNALS

Another innovation for the growth and development of democracy in Pakistan of the truly Islamic type may be introduced by the establishment from time to time of international Tribunals to decide intricate questions of epoch-making importance. The Radcliffe Tribunal, and the Bagge Tribunal of our times, the one demarcating the territories of Pakistan and India and the other elucidating the Radcliffe Award, may be successfully treated as precedents in future in settling major points of Constitutional Law, International Law and Quoranic Law. In case of interpretation of Quoranic Laws, which would be of immense benefit not only to Pakistan, but India, Indonesia and other Muslim States of Middle East generally a Special Tribunal of Seven Judges, four from the Federal Court of Pakistan and other three from Turkey, Egypt and Arabia or other Islamic states would command not only the confidence of all the highest centres of learning and culture of Islamic Jurisprudence and would make an effective contribution to the realization of a new type of Pan-Islamic Federation which has been the ideal of Muslim savants in every age. The decisions of these bodies would gradually cement the long standing differences

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between the different schools of Juristic thought in Islam and would bring the brains of all Islamic countries together in the field of religion, sociology, law, economics and politics that would give a fresh fillip to a new world outlook of progressive nature and would transform the stagnant pools of Islamic theology, ethics and law into a mighty stream, the waters of which would quench the thirst of many a future civilization. The quest of better systems of life which finding no other outlet of spiritual renaissance flared up in short-lived movements like that of the Wahabis would through such channels of Pan-Islamic discussion and co-ordination bring in a newer and healthier synthesis than was dreamed of by the sponsors of the Wahabi or Khaksari movements. As Amir Ali asked: "For five centuries Islam assisted in the free intellectual development of humanity, but a reactionary movement then set in, and all at once the whole stream of human thought was altered. The cultivators of science and philosophy were pronounced to be beyond the pale of Islam. Is it impossible for the Sunni Church to take a lesson from the church of Rome? Is it impossible for her to expand similarly to become many-sided? There is nothing in Mubammad's teaching which prevents this."

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* * Why should not the great sunni church shake off the old trammels and rise to a new life?"¹³¹ The adoption by Pakistan of Islamic International tribunals would be an effective step towards answering this question. Even if there be disagreement between the Pakistani and foreign Judges on points of material importance in the elucidation of the Principles of Islamic Jurisprudence and Sociology, even then the written minutes of these master minds of the times would throw lustre on every matter touched by them and educate the public mind to take wider and grander view of things which has long been deviated to our forefathers.

On other points similarly of International Law or matters of economic importance to the world a Tribunal of seven Judges, four recruited from the Pakistan Federal Court and three from Britain, America, France and the like would bring the wisdom of the world home to Pakistan in such matters of International importance and would bring about a fusion of the best of the East and West. The Quoran repeatedly asserts the unity of the East and the West under the supreme Law-Giver, the Cherisher of Mankind.

131. Spirit of Islam ; p. 454,

"He is the Lord
Of the two Easts
And Lord
Of the two Wests;
Then which of the favours of your Lord
Will ye deny?"¹³²

In the creation of the Universe, God created not the East and the West without purpose,¹³³ not without just ends and the history of evolution of civilization convinces us that the progress of the world lies in the unique synthesis of the two systems of the East and the West: Arabia consumed the sumtotal of the wisdom of Egypt and Greece to bestow in return a better conception of human civilization to less civilized Europe during the contact of the Crusades, which flared up the Renaissance and the Reformation in the West, the mother of the present Anglo-American civilization. The civilization of the West is thus nothing but a counterpart of the civilization of the East and both are ordained by divine ordinance for the benefit of mankind. The artificial severance of all ties between the two would not only be suicidal to further development and progress, but would also give rise to mutual jealousy

132. Quoran: S. IV, 17-18.

133. Quoran: S. XLVI, 3

and rivalry of the two systems. The constant intellectual contact of these two civilizations through these International Tribunals would help humanity to realise the unity of mankind and interdependence of civilizations and cultures, without a just appreciation of the spirit of which would spell disaster and ruin to the present state of things, fast approaching the brinks of the precipice from which many civilizations have fallen headlong into disgrace and oblivion.

Great minds are already thinking of this *rapprochement* between the East and West. "Missionaries have begun to realize that in the East and even in Africa, they are confronted with great and ancient civilizations with their own right to existence and a profundity that plumbs the very sources of life. Their task can no longer be conceived as to replace native by European culture, * * * but only to bring about a synthesis of the two civilizations, to preserve what is precious and fruitful. The East has become the school master of the West, has widened the missionariens' field of vision and forced them into serious self-examination,"¹³⁴ says the modern sociologists of Europe, and Pakistan is well situated and

134. Hans Kohu : Nationalism and Imperialism in the Hither East : p. 267.

favourably placed at the junction of practically four continents of Ideas, to act as the bridge between them all and assimilate the best of all systems in her body politic and render her culture pervious to the noblest heritages of all times through the machinery of such Internatioal Tribunals. The Statesman of Pakistan would do well not to deny the favours of our Lord bestowed on the West but to invite the same to mingle with the favours bestowed on the East and grow in honour and wisdom from generation to generation.

CHAPTER IV.

LOCAL GOVERNMENT AND SEPARATION OF POWERS,

“A slave under the dominion of another ;
He has no power of any sort ;
And a man
On whom we have bestowed
Goodly favours from ourselves,
And he spends there of (freely)
Privately and publicly :
Are the two equal ?”

Quoran : S. XVI : 75.

As Montesquieu the great Frenchman formulated in 1729 the doctrine of Separation of Powers, it was left to Tocqueville another Frenchman, who was born hundred years later, to stress adequately the importance of local governments. In 1834 Tocqueville went to the United States of America to study the democratic institutions there and as a result of his studies came to the conclusion that “*Local institutions constitute the strength of free nations*”. The idea of the supreme importance of local government in a democratic country, to make it truly democratic was further developed, this time,

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by a German political philosopher, Rudolf Gneist who like Montesquieu bases his studies on the English Constitutional system but arrived at entirely different conclusions from Montesquieu. The main difference between two great students of English politics was that Montesquieu wanted to banish tyranny from the state by dividing the sovereignty of the state into three organs so that each organ checked and balanced the other and pictured England as that ideal country where the liberty of the people always remained unaffected by the whims of despotic executive, oligarchic legislatures or capricious Judiciary because of this ideal separation of Powers. Once these powers were separated there remained nothing left, in Montesquieu's conception, than unruffled happiness of mankind. "How England was administered neither Montesquieu nor his English admirers troubled to inquire. They took it for granted that in some way or other England was administered, probably in the same way as any other country,"¹²³ which was not a very important matter in the eyes of political science.

Gneist writing in 1848, a few years after De Tocqueville, propounded a completely different series of causes for the steady progress of the

123. Elie Halévy: *In A Century of Municipal Progress*; p. 15

English people. When statesmen in England were taking pride in their own liberal constitution as idealized by Montesquieu, which according to them saved England from the repeated revolutionary surges of the rest of Europe, Gneist opposed the entire theory of Montesquieu and came forward with the picture of the British system of ideal local Government which for a thousand years had developed the constitutional instincts of the English people and made possible the administration of the country in such a way that liberty of the people became not merely the liberty to be governed by a parliament of their own choice but, also the liberty to administer themselves, the laws passed by their representatives. It was in essence a decentralized form of administration, as opposed to a highly centralized form of administration introduced by Napoleon, a system of highly centralized hierarchy of salaried officials appointed from the centre of power.

The name of Gneist deserves a higher place in the political literature of the world than has hitherto been accorded to him and has subsequently been elaborately discussed and modified by Sydney and Beatrice Webb in recent times. The gist of the theory of Gneist, as given by Helvie, is as follows: "The principle of the

separation of powers made for conflict and disruption ; if it had really been the underlying principle of English institutions, England would have been riper than any other nation for civil and social war. But let us look, said Gneist, beneath the superficialities of the central structure of political government to the realities of local administration ; it is here that the basis and the true originality of English institutions had to be found. England was governed and administered from top to bottom, by her gentry, that is, by the class of wealthy and leisured landowners, unpaid as members of the House of Lords, unpaid as members of the House of Commons, unpaid as justices of the Peace in the counties. This was not an aristocracy of blood ; land was freely transferable in England. Nor was it a privileged aristocracy, as it would have been, for example if the English landowners had been exempted from taxation ; but in fact more than half the local taxes were borne by the land. It was not even an aristocracy endowed with the power of ruling the country by the mere fact of owning land ; the Justices of the Peace were appointed by the King, on the recommendation of the Lord Lieutenant of the County, as a select minority of their class. They were, according to Gneist, chosen

irrespective of party ; the principle of party government did not extend to the sphere of local government. They were endowed both with judicial and executive powers, the principle of the separation of powers did not apply here. Thus all the apparent divisions of the English constitution were merged at bottom into a deep unity of what was already beginning to be called, when Gneist wrote, by the name of 'self-government'. Administration of localities by unpaid office, belonging to the upper and middle classes according to the laws of the country, through local taxation, such was Gneist's definition of it ; and so defined, it was according to Gneist, the 'Glowing centre' of the Constitution. The thousand-year-old constitution of the country was the real safeguard which prevented in England the conflicts between parties from degenerating into a war between classes.¹³⁶

From very early times, the countries and towns were the only units of local government in England. The countries were divided into several parishes. The countries were the vital centres of local government in England. The Justice of the Peace was the corner-stone of local self-government in England, "combining

136. Elie Halevy : *Ibid* ; pp. 16-17.

in their official character almost every judicial and administrative power not exercised from London. The Justices of the Peace were local gentlemen who were appointed in the King's name but were really popular representatives chosen by the Lord Lieutenant with the concurrence of the opinion of the leading gentlemen of the shire." As Trevelyan says, it "was a move away from inherited feudal jurisdictions. It was also a reversal of the movement towards bureaucratic royal centralization; it recognized and used local connections and influence for the king's purposes, a compromise significant of the future development of English society as distinct from that of other lands"¹³⁷. "Nominally State-officials, the J. P. S. really represented local territorial power. In the Eighteenth century, the Justices of peace might rather have been said to control the Central Government through the grand national Quarter sessions of Parliament, than to be under any central control themselves. No local authority had then to consider 'White Hall'. "¹³⁸

The power and functions of the justice of the Peace comprised of the following subjects. They were the Judges in Petty and Quarter

137. Trevelyan: English Social History, pp. 3-4

138. Trevelyan: ibid: p. 352.

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Sessions, they were in charge of roads, bridges, prisons, work-houses, public houses etc. They levied the local taxes and rates. *All sorts of country affairs were under their control.* As great difficulties were experienced in the patriarchal rule of the Justices of the Peace, great reforms were made in English Local Government by the Municipal reform Act of 1835 and Local Government Act of 1888.

The Local Government Act for the first time in English history established elected County Councils as the administrative machinery of the rural areas, and a few years later elective Urban and Rural District Councils. The London County Council and the London School Board which came into existence at this time sprang into vigorous life and introduced new schemes of social welfare, hitherto unknown to the public. The Central Government came into the picture only with grants-in-aid to support the efforts of the local authorities.

It would thus be seen that the system before the recent reforms of 1888, which excited so much of the admiration of Gneist, was the system of administering England through these unpaid local gentlemen called Justices of the Peace for whom the recent reforms have substituted the elective County

Councils, in other words by the substitution of one by the many, but the principle remains the same that the administration of England must be made by local representatives of the best type, only the method of appointment having been changed.

The main drawback of the system of the Justice of the Peace was that although the Justice was more or less a popular man, chosen for his time and affluence, all the powers of the Shire were centralized in this one man who was verily styled as "the state's man of all work." As Maitland jocosely said "A Justice must have something to do with 'Railroads, Rape, Rates, Recognizances, Records and Recreation, Grounds; with Perjury, Petroleum, Piracy, and Play houses'; with Disorderly Houses, Dissenters, Dogs and Drainage'.¹³⁷ But with all this centralization of powers, as opposed to separation of powers in one hand, the Justice of the Peace acquitted himself well in the history of British Legal and extra-legal institutions with so much success as to excite envy of all foreign critics in this critical age. As Woodrow Wilson remarked "Amidst all the extensions of the franchise, all the remaking of representative institutions which this

137. Maitland: Justice and Police, p. 84

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century has witnessed in England, the Justiceship of the Peace remained all the while practically untouched, because on all hands greatly respected until the evident need to introduce system into local government, and the apparent desirability of systematizing it in accordance with the whole policy of recent reforms in England by extending the principle of popular representation by election to County Government."¹⁴⁰ As Trevelyan says, "In the middle years of the Century, fielding, Smollet and other observers of the injustices of life, litterly satirized the irresponsible power of the J. Ps. and its frequent misuse in acts of tyranny and favouritism. There was a corrupt type of J. P. known as 'trading justices,' men of a lower order of society who got themselves made magistrates in order to turn their position to financial profit. But generally speaking, the Justices who did most of the work in rural districts were substantial squires, too rich to be corrupt or mean, proud to do hard public work for no pay, anxious to stand well with their neighbours, but often ignorant and prejudiced without meaning to be unjust, and far too much a law unto themselves."¹⁴¹

140. W. Wilson : Ibid p. 407-408, .

141. Trevelyan : English Social History ; P. 353. .

If then, there was so much centralisation, so much accumulation of power in one hand in the administration of England, if the whole local administration of the Shire was concentrated into the hands of one rich man to the exclusion of all others, completely defeating the theory of Montesquieu on the ideal separation of powers, how could Rudolph Gneist come to admire the system, to extol the system as the bulwark of English liberty against the despotism and tyranny of princes and parliaments? The answer is not far to seek. However much power might have been centralized in one hand, that one hand was a popular man of wealth and leisure, who lived in the country amidst his kith and kin, tenantry and friends, rich and poor and upon whose good opinion his ultimate authority and duration of power depended. Although the king appointed him and the Lord Lieutenant selected him, the selection essentially rested on the good opinion in which he was held by others including other Justices of the Peace and necessarily the sacrosanctity of his office was explained by the background of social welfare. Although in comparison with modern institutions or those of ancient Greece, the office of the Justice of the Peace was a retrograde artifice of

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local government, it was by far the best and most progressive one in comparison with other systems of local government prevalent in contemporary Europe. The parallel institution in France was the office of the Intendant, *the most hateful office that was destroyed at the advent of the French Revolution*, because it could not be made progressive with the spirit of the times. The entire local administration was a completely centralized thing, a "system whose central figure was the Intendant, a direct appointee and agent of the king and absolute ruler within the province; and whose lesser figures were the sub-delegates of the Intendant, rulers in every district and commune. The rule of these agents of the Crown almost totally extinguished the separate privileges of the magistrates of the towns and of the other units of local government. In many places, it is true, the people were suffered still to elect their own magistrates; but the usurping activities of the Intendant and his subordinates speedily left elected magistrates with nothing to do. In other cases elections ceased; the Crown sold the local offices as life estates to any one who would buy them for each. * * * The Comptroller-General, acting through the Intendants and their sub-delegates

and through the royal tribunals managed France. Interference in local affairs, made progressively more and more systematic, more and more minute and inquisitive resulted, ofcourse, in the *complete strangulation of local government*. All vitality ran to the veins of the central organism, and except for the lingering and treasured privileges of the *pays d'états*, and for here and there a persistent form of town life, France lay in the pigeon-holes of a bureau."

"The result was confusion, committees, the Terror and Napoleon."¹⁴²

The above picture from the pen of Woodrow Wilson would vividly represent the way France was administered. To the Kings it mattered little who administered the country so long as it was done in their name and brought money into the exchequer. To the ministers also it mattered little so long as they were ministers and so long they controlled the tax-farmers. The people or their representatives were nowhere in the picture except to replenish the royal exchequer, whenever called upon to do so; and the administration of the laws, if there were laws at all except the right of the rich to grind the poor, were left absolutely at the

¹⁴² W. W. Wilson, *ibid.* pp. 212-13

hands of the King's Intendants who, in the language of the historian of the French Revolution, "was the king's school-master, who made loyalty unpopular by enforcing it and duty distasteful by putting it into the curriculum. The intendances represented an imposed and artificial attempt to unify the provinces, not as co-operative members of a nation, but as contributory estates of the Crown. The Municipalities were strongholds of middle-class monopoly. Even the dioceses were associated with a rich and aristocratic episcopate."¹⁴³

The contrast between the English and French pictures are now complete. While in England the administration was running through the smooth channels of popular co-operation, in France things were managed in the reverse way so that administration became coercive and not co-operative. The accumulated cobwebs of despotism, tyranny and coercion were swept away by the terrible devastations of the Revolution for a time and the whole fabric of the so-much centralized administration went into pieces. But the system introduced by Napoleon meant nothing but a back to the old system except only in name. In the place of Intendance, the institutions of

143. Thomson ; The French Revolution. p. 130.

Prefectures and sub-prefectures were substituted. All the ideas of equality, fraternity and liberty were helpless to establish a popular administration. "The Napoleonic system, and two wars of life or death, led to an over-centralization not unlike that from which France was delivered in 1789. She may need to be delivered again."¹⁴⁴

What was the reason of this colossal failure of France, in spite of the terrible sacrifices of the French Revolution? The reason is obvious. It was a complete distrust of the people, lack of understanding between the common man and the government, the want of confidence of the government, whether monarchic or republican to put their safety in the hands of popular organs of local government, in one word the suspicion of local self-government and the principles wafted by the winds of the Revolution had to seek shelter in other lands without benefiting the mother country. As Bryce quoting a French Author on the subject has put it "all who have ruled France since the Directory which Napoleon over-threw in 1799 have had to fear an insurrection which might change the form of government, whether that form was a Monarchy or a Republic."

¹⁴⁴ Thompson: In 4th p 131

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Self-Preservation is the first law of life. Whatever happens the Monarchy, or the Empire or the Republic (as the case may be) must be preserved. All the means needed for that Supreme end must be used. The control of the whole administration of the country from the centre is such a means. *It gives us the police as well as the army.* It enables us to fill the local posts with our friends, safe men who will serve us at a pinch. It prevents local bodies, which might be, at a given moment disaffected from becoming local centres of open resistance or secret conspiracy. If such bodies commanded large funds or controlled the police or were in any way strong and conspicuous enough to influence the masses of the people, they might be a danger. We must not give them the opportunity."¹⁴⁴

As in Parliamentary government, so in the sphere of local government the history of France is written in words of dismal failure. As Bryce said the French people 'care much more for being governed well than for Governing themselves' which has resulted in a series of constitutions one after the other and centuries of misrule, or hardly any rule at all. Shepherded by a government whose average life is hardly more than a month,

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who scarcely step in the Treasury benches and begin the study of the problems before the Country before they are out of it again, and this system of short-lived government at the centre practically gives the carte-blanche to the local authorities, who devoid of central supervision as well as popular control carry on the administration in a fashionably luxurious way of their own which found the Maginot lines sleeping while Hitler and his hoards had already crossed the frontier and found their rivals napping.

Such were the weighty reasons which impelled De Tocqueville to take up the study of democratic institutions of America. The profundity of his studies and the acuteness of his observations have been admitted on all hands. As Montesquieu had focussed the attention of the world on the English Constitutional principles, Tocqueville did the same on the American Constitution. His first volume of Democracy in America appeared in 1835 and all political thinkers took serious note of it. As Tocqueville described it the American system was characterized by two principles, viz., "first the extreme decentralization of administration and second the exalted political function of the Judiciary in its power to pass upon the

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constitutionality of legislative and executive acts."¹⁴⁵ The success of democracy, according to him lies in the management of local affairs by local institutions. "Self-government in the towns and countries is the Primary manifestation of the democratic spirit that is essential to the whole system. Where it prevails there is no opportunity for the development of the oppression that is likely to accompany a wide-reaching authority in the central administration."¹⁴⁶

England accepted the theory of Local Self-Government as formulated by Tocqueville gradually and substituted elaborate organs of local government in the place of the system of Justices of the Peace which in the nineteenth century had already served its purpose and became antiquated. The later Victorians had already begun to see visions of a better and brighter forms of civic organization. Jeremy Bentham was working out his Constitutional Code to formulate a new plan for the recognition of the local Government on an elaborate basis, and advocated a system of local institutions so as to be

145. Dunning : Political Theories from Rousseau to Spencer,
p. 274.

146. Ibid ; p. 275.

conducive to the greatest happiness to the greatest number.

Men like Ruskin and William Morris had already taken up the cue and renewed the battle of Bentham in diverse ways. Morris wrote in his Prologue to the *Earthly Paradise* :

Forget six counties overhung with smoke,
 Forget the snorting steam and piston stroke,
 Forget the spreading of the hideous town ;
 Think rather of the pack-horse on the down,
 And dream of London, small, white and clean,
 The clear Thames bordered by its gardens green

and the desire of reform gradually spread everywhere. In 1833, the Government appointed a Royal Commission not of old and grizzled statesmen and elders, but one of young lawyers to tour all over the country and suggest the schemes of reform. These youngsters did their job thoroughly well and divided in pairs went in, fact-finding or rather fault-finding missions, throughout the length and breadth of England and within a period of 18 months presented a report containing about 3,446 pages. The report declared that "the existing municipal corporations of England and Wales neither possess nor deserve the confidence and respect of your Majesty's subjects, and that a thorough reform must be effected before they can become.

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what we humbly submit to your Majesty they ought to be, useful and efficient instruments of local government."

"The most common and most striking defect in the constitution of the Municipal corporations of England and Wales is, that *the corporate bodies exists independently of the communities among which they are found*. The corporations look upon themselves, and are considered by the inhabitants, as separate and exclusive bodies, they have powers and privileges within the towns and cities from which they are named, but in most places all identity of interest between the corporation and the inhabitants has disappeared. This is the case even where the corporation includes a large body of inhabitant freemen; it appears in a more striking degree, as the powers of the corporation have been restricted to smaller numbers of the resident population, and still more glaringly when the local privileges have been conferred on non-resident freemen, to the exclusion of the inhabitants to whom they rightfully belong."

"In general the corporate funds are but partially applied to municipal purposes * * * but they are frequently expended in feasting and in paying the salaries of unimportant officers."

"The salaries of corporate officers in a great many instances are not at all commensurate with their duties. The allowance to the Chief Official is often very large, and it is well understood that he is to expend it in private entertainments. The practice of having periodical dinners and entertainments for the members of the common council and their friends, the cost of which is defrayed out of the corporate funds, prevails almost universally."

The findings of this Royal Commission became the starting point of the overhaul of the entire system of local government in England. On September 9, 1835 the Municipal Corporation Act was passed which ushered in a new era of town and city government. This Act applied to 179 Boroughs only. The principles of this Act were again applied to rural England by the Local Government Act 1888. As stated by Jennings: "It is substantially true to say, that the principles of 1835 dominate the whole field of English local government. For that reason it was possible by the Local Government Act, 1933 to generalize the rules of organization and function applicable to all local authorities."¹⁴⁷

The system thus introduced was in spite of Bentham and Mill who enunciated as one of

147. Ivor Jennings in *A Century of Municipal Progress*, p. 62.

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their main points to be that 'local administration must in all its main principles be controlled by a central authority'. But the 'Genius of England refused to put local government into fetters of the Central Executive, the only control envisaged being that of the Judiciary. And "since there was no central control, there was no Minister whose function it was to concern himself with the defects of local government, no civil servants to watch for inefficiency and no Parliamentary representative to draw attention to that part of national life which most closely affected the condition of the people."^{147A} England trusted the genius of her people instead of suspecting them of rebellion, sedition and incompetence at every step; and she has been amply rewarded for her wisdom by the verdict of history.

The English Police system also rested upon the same principle of local self government that every individual was responsible for the maintenance of peace. As Herman Finer points out "The result of this principle is that England unlike the continental countries, has no nationalized police force. It is beyond our purpose to inquire here into the ultimate reasons why the individual and therefore local principle become embodied in British Government;

merely reporting agents of the authorities. The English people are very susceptible of their liberties and have always kept the Police in check so that it could not rob the Englishman of his liberty. The unwillingness of having a centrally organized police over which the local authorities have little or no control was and is so great that even Sir Robert Peel, in disgust, had to write to Lord Wellington that he wanted to teach people that liberty does not consist in having your house robbed by organized gangs of thieves. And the English people have succeeded in having a police under the control of local authorities who "have done magnificent work without crushing liberty; they have it in them to do even more."

Thus the entire system of British administration consists in local government and Judicial control. From the times of the Justices of the Peace to our own days, the same system prevails. Not that the local authorities could do as they pleased. They derived their authority from Acts of Parliament and were kept within the ambit of their powers by Courts of Law. Central control gradually came to be introduced which did not involve a meticulous control of the details of local administration but merely

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and rightly involved a general control in the national interests of divergent or contradictory local policies. The root cause in all this is, that England and U. S. A. have ever been 'so utterly civilian in thought and practice' that they could not even tolerate a militia and service in the militia except in war-time, and that is why England and America have been the most powerful as well as the most democratic countries. They were democratic countries because the people ruled themselves and not their rulers. Their armies conquered the world because they were freemen in arms to defend their freedom, not mere mercenaries employed to rob the poor of other countries by the lure of gold or plunder. Napoleon's France, Bismark's Germany, Hitler's Germany, Mussolini's Italy, failed where the freemen of England and America survived the struggle for existence. *What a lesson to mankind?* As Trevelyan concluded his book on the English Social History with the lines "The battle of Waterloo was won, not on the playing fields of Eton, but on the village greens of England. The men who fought in the ranks on June 18, 1815, were little educated but they had the qualities of countrybred men. To-day we are urban and educated. The flyers of the R. A. F. are not

and could not 'be the product of rural simplicity. If we win this war, it will have been won in the primary and secondary schools." Trevelyan had had the satisfaction of winning the war and knowing the cause. We wish the rest of the world also knew the same.

The system of local government in U. S. A. is more radical than in England. Instead of Elective Councils to administer the country, officials are all chosen by direct election by the people. These elected officials are regulated in their work by the minute details of statutes creating their powers and the rights of the people are guarded by the Judiciary as well as the fear of the next election. Country Boards are the supervisors of all public work. Local democracy in America is foundation of national democracy but the difference with the English type is the preponderance of too many officials of the elective variety, too many local elections. The modern writers on the American system has recommended a "simpler structure of local government with fewer elective officers, with larger authority, and with a more direct responsibility for its exercise."¹⁵¹

151. Munro: The Govt. of the United States. p. 818.

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The main principles of the Anglo-American democracy are first popular sovereignty implying that the people are the ultimate repositories of the sovereignty of the state and the government derives its just powers from the consent and suffrage of the people. Secondly, popular administration, viz., that the people themselves are to manage all their local affairs, including the policing of their areas and need not sit idle leaving all affairs of the administration to paid officials of the government who in the name of public service serve themselves most. Moreover as Munro puts it "the Americans as a people, have been traditionally afraid of concentrated political authority. This explains their steadfast belief in the principle that power should be split up and divided * * * * * This concept of local self-determination gained its first acceptance in England and was brought to America in colonial days. It accepts in general, the proposition that people should be allowed to administer their own local affairs in their own way."¹⁵²

The Soviet democracy in Russia has carried this system of popular local self-government one step further, in its own way. The local Soviets exert tremendous powers of

¹⁵². Ibid : Ch. XLIX,

administration and control in every sphere of local administration under the fundamental direction of the dictatorship of the proletariat. The writers of Soviet democracy claim that it has established a type of democracy "in which the citizen not only elects public functionaries, but more and more carries out public functions himself—lives and makes itself felt"¹⁵³ and they claim not without much justice that their great victories over Hitler's army could hardly be achieved without popular co-operation and administration of immensely difficult matters, which left to the discretion of highly paid state-officials of a centralized system would have led them, through the blind alley to frustration and annihilation.

Turning now to the administrative history of the Indo-Pakistani sub-continent for the last 200 years we find the picture of France enacted 'per excellence'. Sir Shafaat Ahmed Khan ably drew the picture of the British Indian administrative system in his masterpiece on the Indian Federation in the following words :

"The Moghul Government was essentially a despotism tempered by a highly trained bureaucracy. In its later stages it degenerated

153. M. S. S. R. speaks for itself-p. 20.

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into bureaucracy of the worst type. The English Government inherited the old revenue administration of the Moghuls, and the Collector of revenue in each district—the functionary who is the vital link in the provincial administration—performs most of the functions which had previously been assigned to Moghul officials. The complexity of modern conditions has increased his powers in one direction, while the growth of self-government has reduced them on the other. Broadly speaking, the Collector was, and even now is, the pivot round which the administrative machinery revolves. He is still the focus of all activities in the district.

“If De Tocqueville had visited India in 1834 instead of the United States of America, he might have given us a brilliant comparative study of British and French institutions in the early nineteenth century and likened unhesitatingly the position of the British Collector in India to that of the French Intendant before the French Revolution of 1789.

“In India, the secretariate system had been established a long time before the re-organization of the district administration and the result is seen in the process of “stratification” and centralisation which found its perfect

expression in the regime of Lord Curzon. So highly centralised had the whole machinery become that even the bureaucratic mind of the great proconsul recoiled from its coils and he was obliged to give forcible expression to his woes in notes in which one can detect his scintillating phrases and 'Corinthian style.'

"The provinces remained subject to the control and supervision of the Central Government and the latter in turn was controlled in many important respects by the Secretary of State. The chain of dependence was complete."¹⁵⁴

Of course no sensible man would have expected the administrative self-government of England or America in a dependent country ruled by foreigners from White Hall. But the amount of centralization, control and domination of the local administration by the White Hall was such as to be incredible in a civilized country. Under the Government of India Act of 1935 the schemes of local government were such that although the police had been placed in charge of Indian ministers the Civil Services and Police Services had been put beyond the reach of their powers and in the name of "peace and

¹⁵⁴ S. A. Khan, *The Indian Federation*—pp 26-27

tranquility" of the province or the state as the case might be, the Governor or Governor-General might have arrogated to themselves the control of these services exclusively without any reference to the Provincial or Central Ministers, not to speak of the local authority like District Boards or Municipalities who were expected to be mere lookers on of the political drama of their country. Even the ministers were hardly to have any control over their secretaries who were expected to carry out their orders and in case of a clash between the ministers and the members of the superior services, it was the ministers who were expected to eat the humble pie.

Throughout the long history of the British rule in India the Collectors of Revenue have become the pivot of all central and local administration and the institution of the Collectorate like the Intendances of France have epitomized the centralized authority of the British Crown. During the first days of the East India Company certain English Supervisors or Supravisers were appointed about the year 1769 to check the activities of the native Amins and Kanunguoos, to obtain adequate revenues and to detect the fraud of the Zemindars. The system of supervisors or supravisers failed but they were re-employed by Hastings in the name of Collectors of Revenue from May, 1772.

Collection of Revenue being the main duty of the East India Company, the Collector naturally became the keystone of the revenue arch. With the complete disorganization of whatever remained of the Moghul administration in the darkest days of chaos and confusion whenever a new power was created or a new responsibility was conferred, the inevitable choice fell upon the Collector of Revenue. As is well-known the East India Company acting on the advice of Raja Daulat Ram obtained the Diwani of Bengal, Behar and Orisa from Emperor Shah Alam in 1765. The Diwani included not merely the collection of revenues but also the administration of Civil Justice. The Committee of Circuit proposed to establish in the districts two courts of Justice, viz., the Diwani Adalat and the Faujdari Adalat. The District Diwani Adalats were presided over by the Collector and in the District Faujdari Adalats also he was to administer the law with the help of Kazis and Muftis who were to expound the law. The defects of so much centralisation of powers in one hand was felt even by the Court of Directors of the East India Company who in April 1773 sent instructions to the Governor-General in Council to recall the Collectors from their districts although they were all Englishmen. Accordingly they were withdrawn from 1773 and revenue collection was left to

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Diwans and Amins, but they were again appointed to the charge of districts from 1786, just before the Permanent Settlement. With the abolition of the office of the Kanunguo and no intermediary between the Collectors and the Zeminders the process of centralisation was complete. "But in the course of time and after several changes enacted by law, the Civil Court powers were withdrawn and Criminal powers alone remained in union with the Revenue powers. It was in 1831 that the Regulations gave rise to the modern office of 'Magistrate and Collector'. But in 1837 the double function was for a time divided owing to the pressure of Revenue work. The separation was gradually carried out and upto 1845. Collector after Collector was relieved of Magisterial duty. It was only in 1859 that the Magisterial and Revenue functions were again finally united."¹⁵⁵

The Collector under the British administration of India became the repository of all powers. No scheme of Provincial, Central or local government had been formulated by which any of his powers could be curtailed either by Central or Provincial Ministers or by local authorities. The following are a complete list of powers of the Collectors of Districts which subsist even now :—

155. Baden-Powell : Land systems of British India ; pp. 19-20

Revenue Powers:—

1. The Collector is the final authority in the district for putting to sale all Zemindaries for default of paying revenues.
2. Under the Public Demands Recovery Act of 1880 he is also the authority for collection of local or provincial rates for Public work, Postal Cess, Excise Revenue, License Tax, Stamp Duty. "The Collector records a "certificate of arrears" which acts like a decree of Court and can be executed continuously till all is paid."¹⁵⁶
3. He is also, in-charge of the sole management of the Courts of Wards and has wide powers under the Bengal Tenancy Act of 1885.

Criminal Powers:—

4. Under the Criminal Procedure Code of 1898 the Collector is the Magistrate of the District under whom all the other magistrates are subordinate. He is the highest court of original jurisdiction in the district and the Final court of appeal from the decisions of all second and third class magistrates. All powers of withdrawal even of the gravest criminal

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charges, pardon and mercy are vested in him, and he can set at nought all the powers of the highest judiciary by the manipulation of his powers. Under section 435 to 438 he has concurrent and co-equal powers with the District Judge and in any case before the District Judge himself he can authorise withdrawal of the case u/s 494 Cr. P. C. He can transfer any criminal case from any part of the district to any other u/s 528 Cr. P. C. He is also the final appellate authority u/s 515 Cr. P. C. in cases of forfeiture of bonds and u/s 144 in all matters of a likelihood of a breach of the peace in any part of the district. Under section 492 Cr. P. C. he appoints all Public Prosecutors of the district which is only nominally ratified by the government in the case of the permanent vacancies. He is also the sanctioning authority in special criminal cases u/s 195, 196, 196A and other sections of the Cr. P. C. when special sanction of the government is necessary to initiate criminal proceedings in certain special type of cases like conspiracy and the like.

Police power :—

The Collector is also the head of the Police administration, as M

of the District, the Superintendent of Police being merely the nominal head. He is the supreme authority in all the Police Acts of the Province under section 13 of the Bengal Police Act of 1861 and all actions even of the Inspector-General of Police are to be moulded under the General Direction of the Magistrate of the District. Even the High Court of Judicature has no power of interference with the acts of the District Magistrate under many sections as they are to be termed administrative and not judicial acts, although the acts were actually found to be illegal.¹⁵⁷ The right of confiscating all property is vested in him u/s 26 and 27 and u/s 30 he regulates all public assemblies, meetings, processions, etc. and is the final authority of determining the freedom of speech and platform of the district as well as that of the Press. Section 33 lays down "Nothing in the last 'four' preceding sections shall be deemed to interfere with the general control of the Magistrate of the district over the matters referred to therein," thus giving him dictatorial powers over the public assemblies, meetings and the like, and the Police whenever prosecuted for any illegal act could plead successfully the order of the

157. 10 Bengal Law App. 4-18 Weekly Reporter, (Cr.) 67,
20 O. C. 229.

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District Magistrate or any of his subordinate officers as a complete answer to the charge, in absolute contradiction of the law prevalent in England, where the order of a magistrate or any other person cannot save the police from the consequences of their actions. Section 43 runs as follows :—

“When any action or prosecution shall be brought or any proceedings held against any police officer for any act done by him in such capacity, it shall be lawful for him to plead that such act was done by him under the authority of a warrant issued by a magistrate.”

It is needless to recount all the powers vested in him under the different Police, Postal, Railway and other Acts which give him more powers than the Chengis Khan inside the district.

Local Self-Government :—

Over and above the powers already referred to above the Collector is the head of all local self-governing authorities and if not the nominal head at least the real master and Lord. As stated by Baden-Powell “Besides all these matters, there are various miscellaneous duties connected with supply of provisions for troops on the march; the occasional acquisition of land for public

purposes; Municipalities and Local Boards; Ferries; Pounds, Emigration; Primary Education and others, to say nothing of his responsibility as Magistrate for the Police and Criminal administration of the district the District Officer is designated to be the central authority, the "Hakim" par excellence, of his district. Sir George Campbell wrote in 1871-72 (Administration Report, Part 1, p. 66.) :—

'It is the Lieutenant-Governor's wish to render the heads of districts (the Magistrate-Collectors) no longer the drudges of many departments and masters of none, but in fact the general controlling authority over all departments in each district * * * * *

Departments are excellent servants, but as he considers, bad masters. He has, therefore, striven to make the Magistrate-Collector of a great Bengal district, generally comprising one and a half to two and a half millions of inhabitants, the real Executive Chief and Administrator of the tract of country committed to him and supreme over everyone and everything, except the proceedings of the Courts of Justice."¹⁵⁸

We have already seen that the dream of the Lieutenant Governor cited by Campbell was more than realised. The Bengal Police Act was already passed in 1861 before

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Campbell wrote in 1871, which gave him the substance of control over the entire police force and with the passing of the Code of Criminal Procedure (Act No. V of 1898) the Collector was given sovereign powers in the realm of law also so that in the words of Campbell, the Collector became not only supreme over every one and everything but also over the administration of criminal justice of the land through his direct agents, i.e., deputy and sub-deputy collectors, who were also likewise granted powers of the magistrate of the first, second and third classes, he could survey the whole district from his high pedestal of glory and honour and exclaim to the rest of the world like Alexander Selkirk !

I am monarch of all I survey !

My right there is none to dispute ;

Revenue, Executive or Judiciary,

I am Lord of all the dumb and the mute.

As discussed above the revolution in Local Government had already begun in England with the passing of the Municipal Corporations Act of 1835 and gradually spread from mind to mind till its climax and pinnacle was attained by the passing of the Local Government Act of 1888. This fire had also spread to the minds of some of the high-minded Governor-Generals of India who wanted

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to introduce some sort of local self-government in India and train up her people in the art of local government and educate them in the ways of organized democracy. In May 1882 Lord Ripon laid down in the form of a Government Resolution some essential maxims of local self-government to be followed in future viz :—

- (1) The Sub-divisions would form the basis of the Primary boards in rural areas so that the members may possess sufficient knowledge of the localities to effectively administer the same, which may be termed as Local Boards.
- (2) The Local Board should be constituted by a major portion of elected non-official members and should be presided over by a non-official chairman.
- (3) That the municipalities also should be formed by elected representatives of the people to be presided over by a non-official elected member.
- (4) That all these institutions should have the function of managing their own education, sanitation, roads, ferries, lighting, drinking water and other matters of local importance, subject to the ultimate supervision superintendence and control of the Government.

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These ideas of Lord Ripon however conservative and limited in scope was a definite bad in the right direction to educate our people in the arts of organized democracy by granting them an effective say in the matters entrusted to their care. The Bill, however, which was introduced for Rural Bengal was vetoed by the Secretary of State and the Act as it finally emerged in 1885, three years before the English Act, was a far more retrograde Act than the one contemplated. District Boards were created with the District Magistrate as the Chairman and the majority of members to be either nominated by him or to be elected with his favour and *what was taken away from the powers of the District Magistrate by the frontdoor was given back to him with interest by the backdoor.*

A similar Bengal Municipal Act was passed for the urban areas in 1884 with similar provisions and similar control of the District Magistrate. Here also the forest was hidden by the trees and the Silhouette of the District Magistrate as President overshadowed completely the puny figures of the self-governing institutions over which he condescended to preside. After a great deal of time non-officials were of course allowed to be elected Chairman but a study of the local self-governing institutions of our times reveals that only the 'yes' men of the District

Magistrate had any chance to occupy those chairs, as the District Magistrate through his Sub-divisional Magistrates and other nominated members could easily manage the rest of the members on pain of 'official' disfavour, and on the report of the District Magistrate the Commissioner could remove any member of the Boards from their membership of the Boards which acted as an effective check to the spirit of even the most ambitious of the members.

Not satisfied with so much internal control over all the self-governing institutions, a whole chapter was added to the L. S. Act of 1885 for external control. The Chapter was named "Control" and all the sections from 120 to 138 were enacted with the express purpose of giving the District Magistrate and through him the Government a complete over-head control over the minutest details of local administration so that if in any matter the District Magistrate took into his head to differ from the District Board he might effectively supersede, humble down and remodel the Board as the case might be and veto every place of work proposed by the Board. Similar provisions of control were also embodied in the Municipal Act and the Local Government reserved the right to declare the commissioners incompetent or in default to have exceeded or abused their powers and supersede them and evidently judgment was

even, the District Board was debarred to have any say in their matters u/s 50. u/s 51 the Magistrate and his subordinates were to see that the Board worked in conformity with law. The District Magistrate was to have 3 nominees on the Board and u/s 54 the District Magistrate might supersede the Board and appoint any person or persons to take charge of the Board under certain contingencies which might be made to happen at any time and under other allied sections it was fully provided that the Board even if it cannot or does not care to satisfy the public must keep the District Magistrate satisfied in order to survive in its precarious existence in the performance of imaginary duties. The result has been that during the long history of village self-government Union Boards have rather become a canker on the side of the body politic of rural Bengal, an artifice for keeping alive local factions who would be more engrossed in organizing and displaying a loyalty to the District Magistrate, the Sub-divisional Magistrate and their subordinates in the hierarchy than to be anxious to do any useful work for public good and draw the approbation of their electors for future use. The complaint therefore is not infrequent that the *Union Boards perform imaginary public works and draw the bill of expenditures*

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on hypothetical certificates which are never published to the rate-payer who blame God and the rains and the times for their limited necessities in a poverty-stricken land. Hunger and illiteracy keeps them from too close a scrutiny of the work of their representatives in the Board and poverty refrains them from vindicating their rights in Civil Courts so that few of them know anything about self-government and still less care for its blessings,

In 1921 the department of Local Self-Government was transferred to the elected Ministers in the Provincial Assemblies. The nature of the official control was altered and non-official Chairmen were allowed to preside over the Local bodies. But what was the difference? While our legislators were clamouring for more shadow of power in Constitutions and Legislatures, the internal education of the mass of people was hopelessly sacrificed on the altar of centralization and bureaucracy of the worst type, so much so that the Indian Statutory Commission was constrained to confess in 1929 that "no real attempt was made to inaugurate a system amenable to the will of the local inhabitants." On the other hand all the heritage of local government was destroyed by the new innovations which superimposed the sup

of the Whitehall over the supremacy of the will of the people in the remotest villages and the common man was made to realize that he was not the master but a *mere victim of all self-governing institutions*. As Sir Sankaran Nair, in his note of dissent dated March 6, 1919 bewailed: "It can scarcely be denied that in the ordinary villages a democratic form of government prevailed when the British took possession of the country * * * * These village assemblies administered justice—both civil and criminal * * * * They apportioned the revenue or tax among the inhabitants. They owned the public lands and not the government. They consisted of elected members * * * * But they were incompatibly with the Revenue system of the British Government and with their administration of civil and criminal justice. The old village officials were converted by our government into government servants and became according to popular view government tyrants. The village entity was not recognized and in some provinces was destroyed by legislation. The common lands became government lands. The so-called village organizations which are the creations of British Legislation or administration bear no resemblance to the ancient assemblies. It is impossible to any one who has even cursorily

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studied the history of village assemblies to maintain that the spirit of popular government has died out among the people."¹⁶⁰ Sir Sankaran wailed in vain.

It is thus clear that the system which was devised for revenue administration of the Indo-Pakistan sub-continent by the East India Company gradually swallowed up all popular rights of self-government in the interest of good government imposed from above and the ordinary man instead of being the master of the government became slaves of the government servants. All demands for governmental autonomy had no relation to the urge of the people to share in the administration but was a vague aspiration to share power with the British. The root cause of all this as pointed out by Lord Selbourne was that the Government of India was not responsible to the people of India but to the Secretary of State who was responsible to the Parliament. "What was the result of all this" asked Lord Selbourne. "That the centralisation of government in India has become worse and worse. Notwithstanding the heroic efforts of Viceroys like my noble friend opposite (Earl Curzon of Kedleston) to devolve on others some share of the burden that fell on them, yet, as I see the story, the centralisation of

160. See : P. Mukherjee—Indian Constitution—part II.

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over his taxes, his police, his transport, his schools and his justice; that he is now too ignorant to be competent; that he is too much divided to be united in a common ideal. To such answers the crushing retort has been given long ago though conveniently forgotten always. As Bryce said long ago: "Local Self-Government ought not to be given till the people have learnt to use it. Yet how will they learn to use it except by trying? This is the old problem which has always divided thinkers as well as politicians. Swimming can be learnt only by going into the water, but if you go in before you can swim you may be drowned. Those who know the history of Switzerland, America and England do not deny the risk, but think it well worth taking".¹⁶² If the well-wishers of the common man can teach him swimming by abstruse lectures on the actions of the muscles and make him a veteran swimmer before he gets down in a tank, it may also be possible to turn him into a veteran statesman theoretically without ever trusting him with power of self-government. If not, the philosophy of the mind must be changed with the change of times to make democracy possible.

The marriage of administrative autocracy and governmental democracy can hardly be a blessed

162. Bryce; *Modern Democracies*, Vol. I, p. 320.

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ion ripe for consummation or productive of progressive outlook of life. Sooner or later lash is bound to occur and unless the legislators provide for a solution from beforehand the structure of the state and the society is bound to go to pieces. Criticising the broad basis of local government in England and advocating it to be made much more broader, Laski wrote about it in the following manner: The reconstruction of the areas and functions of local government is an urgent matter if efficient decentralization is to be possible; and without efficient decentralization, no reform of Parliament would leave it adequate to its task * * * * * Laissez-faire, in the Victorian sense is dead. Modern forms of regulation involve problems for her which go to the very root of that curious combination of political democracy and aristocratic social control to which she has so far entrusted her destiny * * * * * Representative democracy became unstable because there was no longer agreement between the governing class and the mass of the people, either upon the ends it should seek or upon the ways in which it should seek them."¹⁰ The modern demand for functional democracy is nothing but an extension of the principle of local self-government applied in the sphere of industrial organization as mere political

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democracy defeats itself unless organized on a functional basis. As formulated by Cole the theory emphasises that "man should have as many distinctly and separately exercised votes as he has distinct social purposes or interests",¹⁶⁴ And the Russian experiment in Soviet Democracy has focussed the attention of the whole world on decentralised control of Industry and Agriculture, subject to co-ordination by the Centre which has opened up new possibilities before the world. "The Soviet structure, combined with the unity of legislative and executive, makes politics and administration no longer a special profession of politicians and bureaucrats. It becomes a democracy conceived in the sense of popular activity: everyday participation of ordinary persons in the conduct of affairs * * * * * It does not monopolise Politics and administration: it merely initiates and guides. It is not a caste of officials; but is predominantly composed of ordinary wage-earners * * * * * (and) exemplifies the dominating principle of abolishing the conventional dividing line between the function of an administrator and the function of an active citizen."¹⁶⁵

The sumtotal of the system of organized democracy is therefore the elimination of the

164. G. D. H. Cole : Self-Government In Industry p. 34.

165. Maurice Dobb : Soviet Russia and the world : pp 141-42.

clash of interest between the administrators and the administered, the elimination of a "governing class" as Laski puts it, administering and meting out "unequal laws unto a savage race," a class superior to the common man with the power of vetoing every action of the self-governing institutions. Unless this elimination is carried out in normal ways by peaceful means humanity is likely to take recourse to more violent methods like the French or the Russian Revolutions, which England has been carrying out by a gradual bloodless revolution day by day. The elimination must not be an arbitrary and thoughtless one born out of spite or anger. A calculated and scientific system of administration must be introduced so as to be consonant with the genius of the people, so as not to create unnecessary rivalries or difficulties of co-ordination. The human race marches by its interest, and every organization must be based on special interests and needs of the common man along scientific principles and long-established usages or demands of public policy. The common man must be trusted. *The ultimate repository of the State sovereignty is He; the ultimate beneficiary of the economics of welfare is in Him. He is the Khálifa or the vicegerent of God on earth.* In trusting him and granting him powers of

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self-government, the real centres of popular education are opened up before his vision to prepare him for his nobler heritage of manhood. In essence therefore the real doctrine of separation of powers begins in the sphere of local government. In order to avoid tyranny Montesquieu proposed the separation of the Executive, the Legislature and the Judiciary from one another. We have seen that the theory was based on a misreading of the British Constitution and the experiment succeeded neither in France nor in America. But its real application begins in the domain of local self-government. The power in the hands of a King or a Parliament hardly touches the day to day life of the common man and it matters very little to him whether the Government is of a Parliamentary or of the Presidential or even of the Soviet type. But it matters a great deal to him how the daily problems of his life are tackled by an administration with which he daily comes in contact; whether the taxes he pays are utilised properly for his own sanitation, transport, education and poverty; whether the police he pays for, adequately protects his life and property and thinks itself responsible to him for all failure of duty or loads it over him and passes the time serving other masters; whether the rent he pays for his land by

the sweat of his brow is spent for the betterment of the land itself or for building castles in the air for the benefit of other men. In fact the whole scheme of local self-government is nothing but a scheme for goading the common man to improve his lot and attain his best self not by means of the rod of the task-master, but by means of the consciousness of self-interest. In other words it is the *substitution of the method of coercion by the method of education*. The principle of local self-government is nothing but the principle of respect for humanity in the ultimate analysis of things.

An example from the current history of the Indo-Pakistan sub-continent will illustrate the hopeless mental bankruptcy of our former legislators of the British school. We have already seen how the District Magistrate became the master of all local administration, appointed by the Secretary of the State and responsible to him alone through his agents. The Public Prosecutors and Government Pleaders were his creatures as they were selected, nominated and appointed by him and worked subject to his instructions. The Chairman of the District and Local Boards and Municipalities also were subject to his paternal care and control and financed by him in all their projects. The Police was

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also under his absolute sway and the Union Boards also could 'kowtow' before him only from a considerable and respectable distance. The Chairman of District Boards or Municipalities were not trusted with the management or control of the district, city or even the rural police. Law and order and tranquility in their respective areas were not and could not be entrusted to their care and even the Public Prosecutor of the district had nothing to do with the police administration whose most eloquent upholder he was supposed to be in the Court of Law. If there was any unrest in the district or sub-division it was the sub-divisional magistrate under the supreme care of the District Magistrate who was to quell or "put-down" the disturbance. If there was increase in crimes in any particular area it was the Magistrate and the Superintendent of Police who were to eradicate it by punitive action. If the police itself was incompetent or dishonest there was nothing doing, no-body caring or daring any complaint against these heaven-born services. The Chairman or the Public Prosecutors would not even dare entertain such matters. But when these gentlemen a few days later became translated to the Provincial or Central Cabinet how could they be entrusted with the subjects of Police, Jail, Home, Law and Order? The

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gentlemen who were considered incompetent to manage even the rural police, a mere apology for the name, they were within a few days considered competent to manage the entire field of the police administration of the province. Was it a mere camouflage, a mere eyewash, that they were entrusted with these departments, the real control being in the Inspector General of Police and District Magistrates, or was it a too much belated confession of the insanity of a system which denied ordinary rights but conferred the fundamental ones? We all know that most of our elder statesmen are recruited from the Chairmen of District Boards and Municipalities. His Excellency Sir K. Nazimuddin the present Governor-General of Pakistan was the Chairman of Dacca District Board before he was the Home Minister to the Government of Bengal, and the present Prime Minister of Eastern Pakistan, the Hon'ble Mr. Nurul Amin was the Chairman of the Mymensingh District Board before he adorned the Chair of the Speaker of the Bengal Assembly. The Hon'ble Mr. Tamizuddin Khan, President Constituent Assembly of Pakistan, was the Chairman of Faridpur District Board, Syed Nausher Ali, Chairman of the Jessore District Board, the Late Sir M. Azizul Huq of revered memory was the Vice-Chairman of the Nadia District Board, Nawab Sir K. G. M. Farouqi, the Chairman

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of Tippera District Board, and Mr. Baroda Prasanna Pain, the Chairman of Howrah Municipality before they joined the Bengal Government as ministers. Even in Eastern Pakistan the Hon'ble Mr. S. A. Salim was the Chairman of the Dacca District Board before he was appointed a member of the cabinet and Janab Yusuf Ali Choudhury, the present General Secretary of the Provincial Muslim League, a post of the highest responsibility and honour, is the sitting Chairman of the Faridpur District Board. Neither these highly honoured and respected gentlemen of our times, whose names are to-day matters of history, nor the Boards over which they presided, had any power over the administration of the police, justice or education over their respective areas, and in cases where they had any such power that must have been under the tutelage and guardianship of the District Officers. As long ago as 1915, the celebrated social reformer of England Mr. Sydney Webb in his preface to Mathai's (the former Finance Minister of India) book on Self-Government deplored this system. "We have discussed endlessly" proceeded Mr. Webb, "in England as in India, the shortcomings of 'the Government' and the need for its reform, in this way or that. But we do not give sufficient heed * * * * * to that

part of Government which really concerns us, most, because it is, *merely*, Local Government.

"This neglect is, I venture think, a grave mistake. In the nations, which, in the twentieth century, regard themselves as the most advanced in civilization, the most highly developed in social life—whether we take the United Kingdom or Germany, France or the United States—we find that by far the largest part of government is now that which is not carried on in the capital cities, by Departments of State, at the bidding of Parliaments; but that which is, being administered locally, in village or parish or commune, in municipality or county or district, *by the direction and for the advantage of the people of these localities.* In times of Peace, indeed, Local Government has become in these advanced countries, in the aggregate, more extensive than the Central or National Government. * * * * * This is not because Parliament has become less energetic or less important. On the contrary, it is busier and more important than ever. But the other branch of Government, Local Government, has during the past half-century, enormously grown, so that in England, all the aggregate of Parish councils, District councils, Borough councils and County councils come to be, in magnitude or volume

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of business, greater than all the Government Departments put together. This, I apprehend, is very far from the position in India to-day. But if India is to advance in civilization and prosperity as other countries have advanced, it seems probable that an analogous growth of Local Government—even to the extent of doing more work, spending more money, employing more officials and making more laws than the Viceroy and his Councils—will, in the course of the coming century, take place in India”.¹⁶⁶

The dream of Sydney Webb was never materialized and the system of Local Government in India continued to remain tied to the wheels of the British revenue system with the Collector of Revenue as its mainspring even to the last. Happily that chapter is over and in independent Pakistan we are already in the midst of a social revolution. The Objectives Resolution of the Constituent Assembly of Pakistan has already guaranteed economic and political justice and freedom of thought and we are to adequately organize our rights in this enlightened perspective. The question has already been asked in certain quarters whether with the

¹⁶⁶, Preface by Sydney Webb in Jhon Mathai : Village Govern^{ment} in British India, p. XV-XVI.

attainment of independence, there is any further need of decentralization of local administration in view of the fact that now the ultimate authority rests not in a foreign Secretary of State but in the elected representatives of the people. The question has already been answered in course of the discussion in connection with the system of Local Governments of Britain, U. S. A. and France. In order to make political freedom real, the freedom must not be of one or of a few, it must not be limited to a class of government officials who are to govern the masses on the other hand freedom must be brought home to the common man and the ordinary citizen in his daily life so that he can unconsciously breathe the air of freedom without any effort, and need not be reminded once in four or five years that he is actually a free agent and master of the bonds with which he is fettered, that the ropes with which he is bound belongs to him and was purchased with his money, with the best of intentions in the world, i.e., from preventing him from the remotest chance of running amok and biting other citizens and thus imperil his freedom. In other words our political freedom and independence should not merely be used to putting us in chains so that we may not lose it again or misuse that freedom. *The fear of misuse is in*

essence, a no-confidence motion on the integrity of the common man. If the common man cannot be trusted to build up his own peace, his own education, his own roads and taxes, how can they be trusted to elect good representatives and how can those representatives be trusted with immense power, unlimited funds, with the power of peace and war on humanity? On the other hand as Bryce pointed out long ago that the examples in other parts of the world "justify the maxim that the best school of democracy and the best guarantee for its success, is the practice of local self-government."¹⁶⁷ A democratic type of government which does not put its trust in the common man, which does not educate the ordinary citizens in the arts of self-government but wants to keep them under a perpetual tutelage was aptly described by Mill, which remains a truth for all times as follows:—

"A government which attempts to do everything, is aptly compared by M. Charles de Re'musat to a school-master who does all the pupils' tasks for them; he may be very popular with the pupils, but he will teach them little. A government, on the other hand, which neither does anything itself that can possibly be done by any

¹⁶⁷. Bryce : *Ibid* ; Vol I. p. 150.

“one else; nor shows any one else how to do anything, is like a school in which there is no school-master, but only pupil-teachers who have never themselves been taught.”¹⁶⁹

The Pakistan Constituent Assembly would be well advised to take note of the times and make adequate provisions for a decentralized system of local government in all the Provinces and States. The attempt to tackle the local problems from Karachi or Dacca must be given up; an exploded theory of centralised administration must be forgotten and the story of unrequited promises of control through elected ministers must be discarded as a game not worth the candle. Local and Central legislation must be carried through laying down a scientific system of local government based on the needs of the people. Local Board must be granted sufficient power and authority to conduct its own affairs, raise its own taxes through its own popular machinery, build up its own roads, bridges, hospitals, aerodromes, parks, gymnasiums, play grounds, recreation centres and schools for every village and every city so that the locality may not continue to stare at the Provincial Budget with wistful eyes for a drop of mercy in a sea of want

169. J. S. Mill—On liberty and Representative Government p. 379-80

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and an ocean of distress, so that each village and union may have cheap, effective and homely remedies for every evil and all problems, and a quick means of doing things by self-help and self-government. A simple but amusing story, prevalent in this province, which is often repeated in lighter moments, has morals for the statesman of our age. The story goes that once a fire broke out in a government godown containing valuable government property in a mofussil area where a petty clerk was put in charge. The clerk at once wrote out a despatch to the head clerk in the sub-division who transmitted the news to the District Magistrate in due course. The message reached the District Magistrate in due course of time who duly passed the necessary order for extinguishing the fire. The order duly reached the clerk-in-charge in about six month's time when hardly anything remained to be extinguished and all the work had been completed by the rain and the winds. The intelligent clerk however duly sent in a completion certificate with a bill of costs which was duly passed, audited and paid. The story, as it goes may not be true. Neither are the stories in Æsop's Fables. But still the stories of Æsop are taught to our young boys from age to age and the above story may also likewise be

handed down to posterity in the hope of bringing an ordinary truth home to the sophisticated minds.

But it is one thing to decentralise administration and another to decontrol it altogether. Every question is now-a-days tending to be not only a national question but an international one; but that is no reason why administration should be internationally guided and propelled by a central force. Man is not a machine, neither are men rudderless ships. Therefore however decentralised may local administration be, subjects which have national importance must be nationally guided, and those which are of international importance must be internationally guided and controlled. For example Food has become an international matter to-day and it is quite in the fitness of things that a World Food Conference should guide and control the productions of the different nations of the world, so that the same commodity may not be produced in all countries in excess of their requirements and an essential commodity be not produced at all in any country. As Mill pointed out long ago in his celebrated chapter on Local Bodies "the practical conclusion from these premises is not difficult to draw. The authority which is most conversant with principles should be supreme over principles, while that which is

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most competent in details should have the details left to it. The principal business of the central authority should be to give instruction, of the local authority to apply it. Power may be localized, but knowledge, to be most useful, must be centralized. * * * * *

To every branch of local administration which affects the general interest, there should be a corresponding central organ, either a minister, or some specially appointed functionary under him, even if that functionary does no more than collect information from all quarters, and bring the experience acquired in one locality to the knowledge of another where it is wanted. But there is also something more than this for the central authority to do. It ought to keep open a perpetual communication with the localities; informing itself by their experience, and them by its own, giving advice freely when asked, volunteering when it seems to be required; compelling publicity and recordation of proceedings and enforcing obedience to every general law which the legislature has laid down on the subject of local management."¹⁶⁹ The principle is therefore clear. The federal and State Governments may direct and control by supplying knowledge, information and advice, but it is

169. J. S. Mill—Representative Government : 377-78.

'the local bodies which should be entrusted to administer all matters of local importance, by people selected or appointed by themselves responsible to them in every thing for every matter. Responsibility should be local where as knowledge and guidance should be universal.

METHODS OF CLASSIFICATION.

We are now in a position to advocate a system of decentralised administration on a scientific basis, in which the method of classification of the different powers to be entrusted to the local bodies would be the most important question. At present there are 5 types of units of local administration in Pakistan, viz :—

- | | | | |
|----------|----------------------|----------|--------------|
| Rural :— | 1. The village. | Urban :— | 1. The Town |
| | 2. The Union. | | 2. The City. |
| | 3. The Thana. | | |
| | 4. The Sub-division. | | |
| | 5. The District. | | |

THE VILLAGE.

From time immemorial the village has been the unit of social intercourse in the Indo-Pakistan sub-continent, where men have aggregated and formed a society for living a good life and realise their best selves.

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Two types of villages were found extant in early recorded history. The Hindu Village Community has been much discussed by celebrated writers. The Hindu village with all its draw-backs was essentially a well-planned system which were organised more or less like the ancient city-states of Greece. The division of labour was carried on in such villages on the basis of castes, the Brahmins doing the priestly and educated class, the Khatrias being the warrior class, concerned with the protection of the village and the country, the Vaisyas being the trades-people concerned with the laws of demand and supply of the commodities in use and the Sudras being predominantly the labouring caste like the helots of ancient Greece. The village in such a community was more or less a commune all the classes being mutually interdependent. The village lands after being apportioned for agriculture, horticulture and homestead purposes, were assigned for public use, the village common being for the use of all and sundry and for grazing cattle. Some lands were set apart for the remuneration of village officers or artisans which have been handed down to us in the shape of Altamgha and chakran lands. The headman, the accountant, the watchman, the boundaryman, the superintendent of the tanks and water-courses, the priest, the school-

master, the astrologer, the smith and carpenter, the porter, the washerman, the barber, the cowkeeper, the doctor, the dancing girl, the musician and the poet were the village functionaries each of whom were entrusted with definite duties and whose remuneration were the first charge upon the land. As Mathai pointed out, "the stuff of functionaries, artisans and traders by means of which the village communities carried on their internal government have survived in a recognizable form almost everywhere. A list of officers and public servants in a Madras village at the beginning of the last century is contained in a report of a select committee of the House of commons, issued in 1812, commonly known as the Fifth report."¹⁷⁰

The Panchayat or the village council of five was the administrative authority of the village. They carried on the business of public work, public health, irrigation, drainage, education, co-operative credit with the co-operation of the different castes. The Code of Manu laid down elaborate rules of procedure for the administration of Justice and the Arthashastra of Kautilya laid down principles of economic organization, and settlement of disputes,

The Muslim conquerors of India left the Indian village Community intact without

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disturbing its structure in any way. On the other hand they perfected and systematized the village community by diverse grants and framing rules which have very little been published by scholars except as isolated events, or catalogue of facts. Little thanks have been paid to the genius of the Muslim conquerors who perfected and systematized the village community by regular legal formalities which though fully known to every body have not been systematically and chronologically placed together. During the British rule in India historical research began with Manu and ended with Asoke, and after that the deluge. The Hindu scholars following in the footsteps of their British forbears idealised every piece of gossip as the remnant of the ancient Indian civilization while hardly bestowing a thought on historic documents which lay at their feet, while the Muslim had hardly any scholars to dig up the past and discover the mines of gems and diamonds.

The Muslim villages did not and could not depend upon slave labour and had no class like the sudras and therefore the entire land system underwent a revolutionary change and tenants of land were divided into Khud-Kasht = self-tilling and Pahi-kasht or foreign labourers. The property in land was properly understood in Muslim times and therefore people other

than owners of the lands were inducted on it for a term of years from outside who had not the same permanent, heritable and transferable rights as that of the original settlers called the Khud-kasht raiyats. The documents transferring a partial and limited interest in land were discovered which were given various names as Amalnama, Amaldastak, Kabuliyat, Patta and the like. "The peasantry were an object of great solicitude to the Abbaside Sovereigns and every effort was made to lighten their burdens. Mansur abolished the payment of the wheat and oat tax in money and introduced the mukasimet system, viz., the payment of taxes in kind according to a certain percentage of the crop**** The same boon was enjoyed by the village communities of Northern Persia and Khorasan."¹⁷¹ Similar enlightened systems were introduced into India by the Muslim conquerors as can be easily verified from existing record of rights.

Every village had a grant of Bazi Zamin from emperors which were revenue free, to be used by all the villagers jointly for their common purposes and the institution of the village common was legalised. Other lands exempted from payment of revenue were called La-Khiraj or Revenue-free for the

171. Finucane & Ameer Ali : Bengal Tenancy Act : p. 7.

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support and maintenance of the learned, temples, mosques, priets, mazars, grave-yards and the like. Chakran lands were granted to public servants for the purpose of enabling them to discharge their duties properly and Ghatwali and other similar tenures were created for remunerating the warrior class who were entrusted to defend localities from the sudden onslaught of marauders.

As described in the Amini Report :

"The Mandal or Makadam is the chief Ryot (Raiyat) of a gaon or village and may be said to hold office at the good-will of the inhabitants. His duty and situation lead him to act as a mediator between the ryots and petty collectors of the revenue, to assist them in selling their crops and in raising money to pay their rents, and to settle or accomodate the little disputes which arise in the neighbourhood. He is therefore chosen from amongst the oldest or most intelligent inhabitants ; and his influence and services depending solely on the good opinion of the ryots, it is not the interest of the Zeminder to change him so long as he preserves their confidence."¹⁷² The patwaris were similarly employed in the larger villages as superior officer with the same or similar duties. The Hal Shanah (hal = plough ;

172. Ramsbotham.: Studies in the Land Revenue History of Bengal :
p. 108.

machinery, and by the substitution of plans of farming the revenues of convenient tracts * * * As a matter of fact, we find ex-officials of possessed wealth and energy—amils, Karoris, etc., also bankers and court favourites, receiving the name of Zemindar.

"It is quite certain that before the system of farming came into vogue, and Zemindars of this class were appointed, the village cultivators, where there were no chiefs over them, had a customary tenure, which was certainly, however decayed or weakened, a proprietary right in their holdings. Therefore the Zemindars, when put over them, could not be proprietors in the sense of absolute owner, entitled to the *usus, abusus, fructus et vindictio* of European Law. In 1788 Mr. Shore said that most of the (then existing) considerable Zemindars might be traced to an origin within the last century and a half."¹⁷⁵ The quotation is borne out by the testimony of the great historian Ghulam Hossain author of the *Siyyar-ul-Mutakharin* and is common knowledge to-day.

The office of the Zemindar was not one of pleasure in Moghul times. It had "formidable office-procedure" and strenuous duties. The "*mutchālīka*" or bond generally executed by

175. Baden—Powell; Land systems of British India: p. 506-509.

the Zemindars for performance of their duties were as follows :—

"To observe a commendable character towards the body of the inhabitants at large, to endeavour to punish and expel the refractory and to extirpate robbers; to conciliate and encourage the raiyats and to promote the increase of cultivation; * * * * to take care that travellers might pass in safety, and that no robbery or murder should be committed; and if any one should be robbed, he agreed to be responsible for producing the culprits with the property or to make good the loss, to repress drunkenness and all kinds of irregularity; to pay punctually the assessment less the items of allowed deductions (mazkurat); to transmit to the Government office the official papers required."¹⁷⁶

It will be evident from the above that the village administration was very carefully planned and perfected in those distant days for the welfare of the civil society and the inhabitants were free from the all pervading control of the central government in all matters subject to regular payment of their dues. The Muslim Government was not merely the revenue farmers of the day. The maintenance of peace, law and order was charged on every officer who had anything to do with the land-revenue

^{176.} Baden-Powell Land systems of British India, pp. 511-12.

system. The Zemindars, Talukdars and Choudhurys were not absentee proprietors of the soil, they were, only revenue officers with limited powers, living amongst the people and constantly engaged in works of rural upliftment in which depended their profit and security of service their appointment being always subject to good behaviour. Agriculture being the staple industry, and chief source of revenue of the empire, the Government was always solicitous of the welfare of the agriculturists which was secured by every means at the command of the Rulers of those days. As frankly confessed, by the early British administrators of India, it is a fact of recorded history that "the checks and institutions, which we have before described, were necessary in former times to prevent abuses of this kind, and, for the security of the revenue, they appear much more so at present. The Moghul Government, from its greater vigour, the undivided authority which it possessed and the severe example which it could make of offenders, was able to detect and prevent collusions by means unknown to and incompatible with the genius of our Government." In spite of all the vituperatives and invectives showered upon the good name of the Moghul administration by writers like Sir Jadu Nath Sarkar and others

the documents cited by them show the extent of paternal care and anxiety displayed by the Moghul Emperors of India for the masses. A Firman of Aurangzib to Muhammad Hashim, diwan of Guzrat dated 1669 A. D. ran as follows :—"First—They should practise benevolence to the cultivators, inquire into their condition and exert themselves judiciously and tactfully, so that the cultivators *may joyfully and heartily try to increase the cultivation and every arable tract may be brought under tillage*

"Second—At the beginning of the year inform yourself as far as possible, about the condition of every ryot, as to whether they are engaged in cultivation or are abstaining from it. If they can cultivate, ply them with inducements and assurance of kindness, and if they desire favour in any matter show them that favour. * * * If you find that the peasants are unable to procure the implements of tillage, advance to them money from the State in the form of tagavi after taking security."

"Ninth—If, (God forbid it!) any calamity from earth or sky overtakes a mahal, strongly urge the amins and amils to watch the standing crops with great care and fidelity; and after inquiring into the sown fields, they should carefully ascertain the loss according to the comparative statement of the p

produce ('Haſt-O-Bud'). You should never admit as valid any Sarbasta (exemption) clamity, the discrimination (tafriq) of which depends solely on the reports of the Choudhuries, Qanungoes, Muqaddams, and Patwaris ; so that all the ryots may attain to their rights and may be saved from misfortune and loss, and usurpers may not usurp (other's right)."

In fact all Sanads were granted to Zemindars from the Emperors under similar terms, as will appear from the Sanad quoted in the Fifth Report purporting to be from Nawab Sarfaraz Khan, the Subedor of Bengal to one Ramkanto, a Zemindar of Rajshahy Purganah."¹⁷⁸ The Zemindars were charged with military and police duties for areas under their control and proper performance of the police and military duties was one of their conditions of retention of office. Land was not treated as the means of making one person rich by giving him "rent" or unearned increment as defined by the classical school of Economics. Land was a place to live in on a co-operative basis and rent was a payment to the state for the protection of the state. As Mr. Field had to confess "but there is one sense in which it is absolutely true that rent is a British creation. Competition rent—that rent of which the principle is explained by western Political

178. Fifth Report : XLVI

Economists, had no existence in India before British rule; * * * * * That State of things in which land is regarded merely as one of the many modes of investing capital and is competed for up to the point at which it yields a profit at least equal to that which can be obtained from other objects of investment, never existed in India."¹⁷⁹ Neither the great English Jurists nor their best statesmen supported the Zemindary system, and the destruction of the rights of the villagers. Mr. Justice Trevors celebrated Judgment in the great Rent case made the position of the ancient land revenue-system clear in these words "The Zemindar enjoys his estate subject to and limited by these rights and interests of the raiyats, and the notion of an absolute estate is as alien from the Regulations as the old Hindu and Mahomedan Law."¹⁸⁰ But the wheels of the British profit-sharing East India Company stopped at nothing and land was made to yield all the golden eggs irrespective of the question whether the geese would survive the process or not. Land thus being only a subject of lucrative investment, quite in the fitness of things, to a Registered Company, of Share-holders named the East India Co., it mattered very little to them

179, . . . Field's Introduction to the Bengal Code, p. 74.

180, Weekly Reporter, Vol. III, Act X, p. 29.

whether the village system was left 'in' tact or perished. The company cared only for profit, for a return for their investment and *any method of administration best suited to the yielding of more profit was to them the best 'system of 'administration.* Secondly the motive of profit-sharing was wedded to the English conception of Land as Real Property held in fee by the Barons from the King and over-night the Zemindars were invested with the full powers of proprietorship. "The system introduced by the English, was avowedly directed from the very first to the creation of a class of rent receivers. The Permanent settlement of Bengal, in leaving the majority of the tenant class at the mercy of the new proprietors with vague promises of future protection, afforded a good opportunity for putting up peasant holdings to competition and creating competition rents, had such a creation been consonant with the ideas and requirements of Indian society."¹⁸¹

The third incident of the new land-revenue system introduced by the British was the new sale Law which along with the other two incidents discussed above cut at the very root of the village organization in India by taking away all sense of security from the tenants of land by allowing "confiscation of the rights

181. Field : Introduction p 75.

of persons who were in no default and had no means of protecting themselves" whenever a superior tenancy was brought to sale. All sense of security was at an end. The greed of the tax-farmer had swept away all the rights of the common man established through centuries at one stroke of the pen of the English law-givers and the ancient village civilization of India was destroyed forever. As Field has pointed out "the immediate effect of all this was, in the language of Mr. Mackenzie, to disjoint the whole frame of the village societies, to deprive multitudes of rights and property which their families had held for ages and to reduce a high-spirited class of men from the pride of independence to the situation of labourers on their paternal fields."¹⁸² The notorious "Haftam" and "Panjam" regulations by which the Zemindars were invested with absolute and arbitrary powers of distraint are well-known and as the Floud Commission found that men of the highest position like "Colebrook Lord Moira and others were of opinion that the Regulations, however, well-intentioned, had had the effect of destroying in part the custody rights of the raiyats,"¹⁸³ but the finding of the Floud Commission was too late and the

182. Field ; *Ibid* ; p. 165.

183; Report of the Land Revenue Commission, Vol. I, p. 22.

Raiyat stands to-day in the same position as during the last 150 years of British Rule or worse.

Stage by stage was thus ruined the most scientific structure of village and its local administration raised by the genius of Aryan

Directors of East India Company. When the English poet Goldsmith was lamenting the ruin of the sturdy peasantry of England in the hands of greedy land-holders and singing the plaintive song of the Deserted village, his compatriots in India were initiating a parallel policy of destruction and ruin in India with no Goldsmith or Milton to lament the devastation of the rural life of idyllic felicity in what was then known as the Paradise of the East. The doggerel poem of an English Buccaneer of Stevenson represents the picture of devastation completely :

Fifteen men on the dead man's chest
Yo! ho! ho! and a bottle of rum!
Drink and the devil had done for the rest
Yo! ho! ho! and a bottle of rum!

Substitute, "a handful of Rent," for "a bottle of Rum" and "greed" for the word "drink" and the picture of destruction becomes too

true of the rape of the Indian village at the hands of our foreign conquerors. We were told of the Moghul despotism, of its military government and the dominance of Persian nobles in the Moghul administration. We have been taught to contemplate the visions of the execution of Bandah for the destruction of Sirhind and the Black Hole tragedy but beneath the surface of these actual or mythical stories the real genius of the Muslim Empires in India were concealed for ever to hide their own black misdeeds which the new conquerors began to perpetrate in this fair land for feeding the English Nawabs who financed the East India Company. The newly centralised administration set up by them made the whole country subservient to that one man, the "Collector, supreme over every man and everything" in the realm, before whom the Zemindar, the tenant the local self-governing institutions, the Judiciary, the legislatures, the police all bowed down in submission as if to a superman who was created only for receiving submissions and habitual obedience. If in England sovereignty rested with the people as represented by the Parliament, in British India it rested with the Crown as represented by the Collector of Revenue, a mere gatherer of other people's hard earned money. If democracy is to be organized again in this

the centre of responsibility, must be shifted again from the oligarchy of official, whether foreign or native, to the mass of people, who live in the muddy, forlorn, deserted villages, who in political theory at least, are to-day universally recognized, as the beneficiaries, as well as ultimate repositories of all political, social or economic power. How best to do it? Let us consider.

Long before the Dravidian civilization spread in India, the unit of human habitation and local administration was the village. It was the primary unit and basis of human culture and development. The Dravidian, Aryan and Muslim conquests accepted the Unit and improved upon it. We are not concerned here with the types of villages and with the hair-splitting classification of villages undertaken by Main, Baden-Powell and other scholars. Whatever might have been the origin of classification of each type of villages the central fact remains that the village was the real unit of administration of human affairs and other units were mere federal unions of the system of villages. Life flowed consistently there unruffled very much by external force of circumstances. The village was more akin to the Greek City-states than any other unit of the primary type. As Lord Metcalfe, in his classical description of

the Indian villages pointed out "The village communities are little republics, having nearly everything they want within themselves, and almost independent of any foreign relations. They seem to last when nothing else lasts. Dynasty after dynasty tumbles down ; revolution succeeds to revolution ; Hindu, Pathan, Mughal, Maratha, Sikh, English, all are masters in turn ; but the village communities remain the same. In times of trouble they arm and fortify themselves * * * * *. The sons will take the places of their fathers ; the same site for the village, the same positions for their house, the same lands will be re-occupied by the descendants of those who were driven out when the village was depopulated. * * * The union of the village communities, each one forming a little state in itself, has, I conceive, contributed more than any other cause to the preservation of the people of India, through all the revolutions and changes which they have suffered, and is in a high degree conducive to their happiness and to the enjoyment of a great portion of freedom and independence."¹⁸⁴

The only parallel to the Indian village in the whole history of human societies were the brilliant Greek city states of ancient Greece which differed in some important

184. Elphinstone : History of India, 5th ed. p, 68,

respects from the Indian village. The Greek cities were larger aggregations of population, more or less of the size of "Unions" created under the V. S. G. Acts and the Greek cities were independent of outside control. The Indian villages were much smaller aggregations of men and were subordinate to the kings; the Emperors and Provincial Governors. But the Greek political theory recognised that the size of the city should be so small as to enable citizens to know each intimately and take effective part in the government of the city. In the census definition of India a town included 'every continuous collection of houses inhabited by not less than 5000 persons, which the Provincial Superintendent may decide to treat as a town for Census purposes' and by implication all other aggregations of people less than 5000 were ipso facto villages. In the Census of India of 1911, the following types of villages were found :—

Rate of population per thousand in
towns and villages.

	Villages.	Towns.
British India—	905	95
Native states—	900	100

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Populations :—

	5000 and above	2000 to 5000	500 to 2000	Under 500
British India—	18	138	483	360
Native States—	10	114	454	422

The Census Report of 1911 compared the townships of the different states of the world as follows :—

"In Germany 'landstadte' or places with a population of 2000 to 5000 are included in the urban category; in America the same category is used to include all 'incorporated' places with a population of 2500 and upwards, and in England all sanitary districts with 3000 or more inhabitants. In fixing the standard for India at 5000, however, we have certainly not erred in the direction of over-exclusiveness."¹⁸⁵

The census of 1911 practically remains true to our day in point of analysis. The average Indian village was more or less a habitation of about 2000 people. Villages may grow gradually upto a reasonable size and a population of 5000 is the reasonably maximum but the reasonable minimum must be fixed at 2000, below which a village cannot properly function as a well organized community. Modern amenities of civilized life like the Post Office (including Saving Bank for the poorer citizens) schools, Play Grounds, Parks, Libraries and

¹⁸⁵. Census of the India, 1911, Vol. I, part I, p. 291,

Hospitals along with other proposed amenities, which we shall discuss hereafter, cannot suitably arranged for the smaller villages which, if allowed to exist, would remain backward, ignorant and unhealthy. The future village-system of Pakistan must be remoulded, in the light of facts and circumstances of the modern age if an efficient system of local self-government is to be discovered. The village commune is of the most vital importance to the nation and a neglect of the same has brought India and Pakistan to the verge of economic ruin and bankruptcy. As Bluntschli put it "the personality of the commune is to its district what the organized nation is to its country. It inspires it with its common life ; not, indeed, a life of political activity, but of common social and economical interests."¹⁸⁶ The village thus must be the primary unit not only of social life but also of political administration and economic organization to make good life possible and the present British system of local administration with its artificial, uneconomic and arbitrary units to satisfy the autocratic idiosyncrasy of a foreign conquering race, must be abandoned with thanks and consigned to the flames. The modern divisions of the country into Unions and Thanas are extremely uneconomic, unreason-

186. — Bluntschli : The Theory of the State : p 248.

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able and arbitrary and unsuitable to the genius of the people or spirit of the times. Even the Royl Commission on Decentralisation in India strongly recommended the village to be made the primary unit of decentralized local administration in eloquent words as cited below :—

“The foundation of any stable edifice which shall associate the people with the administration must be *the village*, as being an area of much greater antiquity than (the new administrative creations) and one in which people are known to one another and have interests which converge on well-recognized objects.”¹⁸⁷

In fact the soul of a civilization lies buried in its rural populations living in scattered villages, while the towns are merely the centres of display of vices, the pomp and greed or in other words, the frailties of the kingdom. If the statesmen of our times can make the village live again the nation and the state is bound to revive and pulsate with a new life and vigour which can not be achieved in any other way. Every institution of the constitution, the economic, penal and social laws, must be measured and made in conformity with the needs of the village where our teeming millions live and not in terms of a few luxurious

187. Parliamentary Papers : 1909, pp 238-39,

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cities where flock around the idle rich and the pampered classes with the prides and prejudices of a self-centred oligarchy. But in spite of the recommendations of the Decentralization Committee as quoted above, our British masters liquidated the village by creating a new arbitrary unit called the "Union" inconsistent with the previous policy of the of the ancient revenue system of the land which was typically based on the village economy as we have already seen and which not only recognized the village as a unit of human habitation but also the village as the primary and the most important unit of the local administration.

The policy of the British India (not the British, which was consistently denied to India) Administration thus ended in dismal failure and both the Union Boards and Union Benches failed to do any appreciable service to the rural population of our country and became merely the centres of narrow and selfish party-politics wherein the parties were concerned not with any philosophical or doctrinaire differences but merely with the control of the machinery of the Union Boards for their personal aggrandizement. The Union Board roads, are maintained by God, the other Union Board functions are discharged on paper on the basis of 'completion certificates' as

noticed above, and the rural police paid by the Boards serve so many masters, that they end by serving none, and giving weekly haziras to the Union Board Office and Police Station they draw their usual pay which is paid with the guilty-conscience that the same is not adequate even to maintain a dog and accepted with the guilty-conscience that it is being taken without doing any work at all. The picture is like that of the two celebrated pick-pockets of Benares, one of whom had only a single coin which the other wanted to steal. After removing the coin from the others pocket the thieving scoundrel found that the other was even a greater scoundrel than he and the coin was only a counterfeit one and all his labours had been lost in vain.

In theory the work of all the Union Boards and Benches are supervised by the Circle Officers and that of the rural police by the officers of the Police Station all of whom are responsible to the collector of the district. Thus all supervision from above are regularly and duly done and proper reports are duly prepared and submitted to the Collector, Commissioner and Local Government who publish progress reports from year to year. Open any volume of Indian Economics or the Reports of the Ministry of Agriculture or local Self-Government and a pletho of

schemes of crop rotation, co-operative farming, co-operative marketing, co-operative credit, schemes of horticulture pisciculture, poultry-farming, cottage industries and a hundred other mellow schemes of rural upliftment are daily being printed, discussed and circulated to the Union Boards and progress reports are being published with the photographs of Hon'ble Ministers themselves tilling the soil with plough and cattle in the midst of police-escorts and official supervision with bold headlines. Go to those villages, agricultural farms and other places and see what is happening there. In corners of district towns, in secluded urban areas, model agricultural farms are being operated which are neither model nor any sort of agriculture. Crops worth say Rs. 1 lakh are being raised there at a cost of say of Rs. 10 lakhs through a hierarchy of Supervisors, Overseers, Contractors, and their assistants and the Agriculture Departments of our governments are serving the two-fold purpose of mitigating educated middle-class unemployment and satisfying the conscience of the government to avoid the blame of doing nothing to improve agriculture in a agricultural country. The simile is not unlike the story of the pious king who while sleeping one night in his palace heard footsteps on the roof and enquired who was making

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noise. A prompt answer came from the nocturnal visitor that he was looking for his lost camel. The king surprised at the answer rebuked him for being such a fool as to look for a camel on the roof of a palace. The answer of the unwelcome visitor was that if the King could find God in his palace he also could possibly find his camel on the roof. What we find now-a-days is that costly schemes of agricultural and rural improvement are being organized not in the villages but in palatial buildings, in cities and towns and being executed by highly educated gentlemen who have never seen villages except through the windows of railway carriages and in whose mind the word "Village" brings back all the poetry of the "Megha-Dut" of Kalidasa, all the romance of the "Lucy" poems of Wordsworth and all the idyllic happiness of the shepherds of Chaldea who gazing at the starry nights in their desert villages invented the science of astronomy.

"The hawthorn bush with seats beneath it

For talking age and whispering lovers"

Not so are the villages of rural
Pakistan, nor anywhere else in the world.
The essence of the democratic principle of
local government lies in the fact that the
problem of the village must be solved by the

village itself by the villagers themselves, that of the district in the district itself, that of the city in the city itself by the citizens and that of the Province in the province itself by the people thereof. Supposing that in a modern village a boundary dispute arises between two adjoining land owners, what happens? Either a murder or grievous hurt or at least a simple hurt is committed. The parties rush to the criminal court in mutual vindication of their rights and after a protracted ruinous litigation of both parties in the criminal court, the parties are ultimately referred to the civil court where after mutual skirmishes of a preliminary nature an Amin is appointed to survey the boundary and report to the Civil Court the result of such survey. If the lands in the meantime are not sold out by both sides to defray the cost of litigation, so as to leave nothing to be measured and surveyed, the survey report goes to the Civil Court whose decision is challenged in First and Second Appeals and unless the parties are Zemindars of wealth they are usually 'eaten up' by litigation long before the dispute comes to an end. What happened at the time of Manu? The matter would then have been referred to the King or Judge at once who would have settled the same by local evidence of the oldest

inhabitants.¹⁸⁸ If again the problem arose in Moghul times? The matter then and there would have been referred to the village Amin and the Hal-Shana, who would have then and there gone upon the land, measured the boundaries with reference to the village records and decided an ordinary dispute in course of the day. Under British dispensation the heart and circulatory blood-vessels of the village have been transferred to district and sub-divisional towns in alien hands who cannot function unless elaborate formalities are gone into and elaborate instructions are invoked. The circulatory and the respiratory system of the rural areas having thus been artificially transferred to bodies neither resident in the village nor responsible to the villagers, unearned wealth is accumulating in the towns and cities while the villages go decaying and the foreign injections of international trade which are being applied to remove the disease are gradually suffocating the body social, already exhausted by the British revenue system and local government.

Returning to our original search as to the size of the village unit, we thus find that the village must be :—

1. A sufficiently large unit to make competent administration of local problems possible.

188. Mathai : Village Government in British India, p. 2

2. That it must have control over its own affairs and all village administration must be responsible to the villagers.
3. That the rural police must be sufficiently efficient to perform its own functions and must be responsible to the village Council of Elders.
4. That the rural taxation, sanitation, agriculture, health, sports and education must be in the control of the village council.
5. That all petty civil and criminal justice must be vested in the village Council and cases involving a value of Rs. 500 only and above being referred to Civil and Criminal Courts along with criminal cases of heinous nature.
6. That the revenue of the village lands must be the first charge on the funds of the village Council, which would raise all revenue, taxes and rates through its own officers and the present system of sale law is to be abrogated,
7. That each village must keep a complete and adequate number of sets of its record of rights, maps, survey, reports and other necessary documents, in charge of competent officials who shall be responsible to the village council and

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the dereliction or neglect of whose duty would be an offence against the state to be punished as a heinous offence.

8. That all supervision, control and guidance of village administration by the district and provincial authorities must be merely consultative and informative and not coercive, so as to take away the spirit of local responsibility.
9. That all poor relief, Zakat and other humanitarian institutions must be controlled by the village Council under the guidance of the District and Provincial authorities and definite institutions must be established in every village for poor and old age relief to bring all relief home to the villagers themselves.
10. That the village Council must be a sufficiently large elective body to secure adequate representation of all shades of interest and to make impossible coterie rule in their own interests.
11. That the village council through its sub-committees must be the corresponding agents of the Agriculture and Industry departments of the Provincial or State governments without the intervention

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- of a hierarchy of useless, highly paid, officials.
12. That the duty of religious and primary education of every child, male or female, would be vested in the village council through its Education Committee which would be required to act in accordance with the national and provincial education Codes.
13. That all public fishery, mosques, temples, parks, play grounds, grazing lands, hospitals, schools and protected gardens should be vested in the village council, which shall be responsible to the villagers for due performance of their functions gross neglect or dereliction of duty to perform, which would be punishable as an offence against the state on petition to the magistrates, by at least one-tenth of the adult citizens of such village, false complaints also being similarly punishable.
14. That the Civil Courts must strictly guard the rights and liberties of the people so as to effectively control the proper discharge of public functions through judicial control.

It is thus by evolving the village that we would succeed in evolving a thoroughly

democratic spirit in the country, by harnessing the local patriotism of the people for building up our national patriotism and educating the bulk of our people in the ways of democracy, so that they learn to cherish the freedom of the country with devotion and not be made unwilling slaves and mercenaries sent by the whip of the task-masters to defend a freedom which they have never tasted and loved and which in the hands of reluctant masters became only instruments of their oppression and rapacity. As a celebrated writer on Geography has pointedly clarified the position "Geography teaches that regional consciousness in all its degrees is a function of mankind and that internationalization, in so far as it attempts to stifle regional expression is a fallacy."¹⁸⁹ The future scholars of our country must undertake to write a whole encyclopaedia on the constitution of the village community in a Modern Democratic country.

THANAS—After thus creating the village, the primary unit of human civilization, next in point of importance is to create the federal centres where the co-ordination of the activities and administration of the villages may be centralised for the sake of convenience. From the discussion already made above it would be clear that the system of the present

¹⁸⁹, Rudmose Brown : The principles of Economic Geography • XV,

Union Boards must altogether be abolished, and some unit larger than the Union and smaller than the thana should be set up. At present about 25 villages on an average constitute the union with about 7 or 8 villages in each ward, whereas about 10 to 15 Unions constitute each thana. With the redistribution of the area of each village as indicated above, the number of villages in each Union on the present scale would be about 7 or 8 villages which would be too small a number and about 100 villages in each thana which would be too big an area for effective supervision and control. It is therefore advisable that the number of thanas in each subdivision should be increased so that the big thanas may be divided into 3 smaller thanas and smaller ones into 2 small thanas, which should be the federal centres of villages for all practical purposes.

With the abolition of the Unions, the thanas would thus be real centres of educative control of the villages and thus assume a real importance in national economy. At present the thanas are mere geographical expressions with no real existence except the location of the police station. In the proposed scheme of village local government also thanas must remain the centres of location of the district police force which would have

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to control, heinous crimes and gangs. The district police must be a body responsible to the people of the district and directly managed by District Councils or Boards in the English pattern, so that they may learn to discharge their duties under the constant care and supervision of the representatives of the people. The thanas must be so organized as to be not only the location of the District police but also of higher schools and technical education as well as of other light cottage industries of national character from which the villages must be constantly fed with education, information and guidance and the villages in turn feeding the arts and crafts, Schools and recruitments for the thana police and other thana officers. All thanas must be organized with a view to ultimately be real federal unions of the villages in all aspects of social political and economic life of the village. Thanas should also be centres for the administration of civil and criminal justice of primary nature, the courts having original jurisdiction in the smaller cases, so that the villagers may have speedy remedy in urgent matters near at hand and may not have to ruin themselves by constant journeys to distant towns to enjoy the luxury of litigation. Even under British administration there have been

established many choukis near about the police station compounds in thanas which have done considerable civil work of original nature.

If the thanas are properly organized in the way as suggested above, the present sub-divisional head quarters may easily be abolished which may be converted into thanas. But till the proposed system be fully executed and developed, the sub-divisional head quarters may be retained for control of the thanas.

The real unit of local government next in importance to thana would be the District Union which would really be the federal centre of all thanas and sub-divisions and serve as the centre of all political, social and economic development of the Country-side.

The structure of the District administration must likewise be of absolutely democratic and self-governing type. The boundry of a district in our land has been fairly and firmly established for a long time to require any hasty change, unless some changes are advocated on grounds of public policy.

The creation of the District must be within the power of provincial or state legislatures just as in England or America and the U. S. A. has passed a general country code, though special legislation for individual countries are also made from time to time. As in England

and America the present districts must be made political as well as administrative and judicial districts. We shall take up these divisions and see how far the present nature of the district administration wants changing in conformity with the ideal of local government in different countries.

On the question of size of the district, ideal for the purposes of local administration, it seems that the present size of our districts constituted at different times by our British rulers in the 18th and 19th centuries were determined haphazardly, without any thought about the convenience of the people and the sole determining factor of the area and the population of the districts was the convenience of the East India Company in collecting quickly their annual revenue. Although the Congress and the Muslim League fought for responsible government for a long time neither of these organizations thought of formulating the principles which should determine the area and population of administrative areas suitable for efficient local government consistent with the needs of and convenience of the people. It is well known to the students of the Revenue history of the East India Company that after the acquisition of Dweani the entire territory was apportioned between the different Provincial Councils of Revenue as follows :—

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March, 1787), under which the number was reduced to 23, or including the salt mahals 24. Immediately after-wards (8th June, 1787) rules were made for the Collectors, and those rules were subsequently re-enacted with the amendment of Regulation II of 1793."¹⁹⁰

The amount of revenue therefore was the principle upon which districts were physically constituted. Those territories therefore where revenue was small the area under the collector-ships was inordinately big like that of the Mymensingh district, whereas the area of high revenue paying districts was quite small. *The British Indian revenue system need not be a permanent clog in the wheels of the administrative system of Pakistan and this nascent national state must at once, without fear or frivolity set up its own administrative units in the light of its economic, social, cultural and political necessities according to modern standards. With the limits of natural geographical divisions, the district units must be so constituted as to form a compact, homogeneous, and easily administrable area which should neither be so large as to be outside the control of the administrators nor so small as to be incapable of forming a self-sufficient unit. In this analysis it would ultimately be observed that a modern district should not have an*

^{190.} Field : Introduction, para 74,

area of 'un-managable' size or population like the present district units. This would necessarily imply that in areas with a dense population the number of administrative units would be larger, considering the total area, whereas in lightly populated areas the number of units would be smaller, other things remaining the same. Except in very large districts like Mymensing and Dacca, the average size of a present sub-division would be most suitable for that of an administrative district both in area and population. It would multiply the present number of districts by about 4 or 5 and thus create four or five times as many centres of local self-government where the patriotism of the local people would find free play in constructive channels and would confine their activities in active pursuits leaving the more complicated affairs of the Provincial or Federal administration to better educated and better trained politicians. It would further lessen the congestion of work of Provincial legislatures and state civil services by taking away the handling of unnecessary local problems from their sphere of activities and would thus facilitate not only a training centre for future statesmen but also allow the people to do their own jobs in their own areas so that questions of the nature of maintaining a local hospital or charitable institution or the like need not

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be referred constantly to highly trained experts from Honolulu or Timbuctoo to make efficient administration possible. Efficiency of administration by foreign or highly paid experts is a national waste which should be condemned as a criminal act. If the nation is to be kept ignorant and unable to think out its own good in ordinary day to day affairs of our life and dependent upon expensively trained members of the Civil Service, the nation must be doomed to destruction and no amount of *intra-muscular injection of efficiency into the body-politic* can create a nation of political acrobats out of a people who are denied the right to think and work out their own salvation in the most ordinary affairs of life. If the mind is kept static and the body be made inactive, paralysis of the entire body social is the only inevitable result of such an unnatural state of things and that is why political philosophers laid down long ago that good government was no substitute for self government.

The area of an administrative unit having been scientifically laid down as somewhere near that of an ordinary sub-division in an average modern district the next question is as to how to lay down the administrative machinery of the district and to demarcate

its functions. We have already discussed the outline of the functions of an administrative district in modern democracies. A comparative table of local administrative functions delegated to county authorities in Europe or America under 6 heads Drawn up roughly for comparison would show how far the counties in those countries serve as, political, administrative and judicial districts :—

The above table is not the picture of a scientifically assessed system of local administration but is a mere classification of the main functions of the county councils in U. S. A., Switzerland and England just to show how much decentralization has been practised in those countries with salutary results. This spirit and system of decentralized administration has not curbed the power of central or provincial executives or legislatures. On the other hand these delegated powers have released the energy of the central and provincial or state executives and legislatures in undertaking higher schemes of national, industrial and agricultural organization of the country as a whole without creating any competition between the central and provincial administration on the one hand and local administration on the other. In fact the two systems of administration are nothing but supplementary to each other and any distrust

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surpassed in a national state of the modern times.

Next to Greece ranks the democratic traditions of Switzerland which is still the high-water mark of democratic institutions. With its Referendum, Initiative and Recall, all administration is practically at the feet of the common man, and Bryce rightly dedicated Wordsworth's poem on English freedom to Swiss Liberty.

The Anglo-American system of local government is at present the most cherished system in the world outside Soviet Russia. All the powers and functions vested in the local bodies in England and U. S. A. are centred in the Collectors of the Indo-Pakistan sub-continent, as if by way of contrast, and any freedom here can hardly be cherished by the people unless the mighty colossus of the collector is broken into pieces by a mightier Sultan Mahmud and all his powers transferred to the District Councils elected by the people, the idea of Liberty would be a force and the Rights of Man would be nothing but a series of mockery. It is not by worshipping the fetishes of the British administration of India, a legacy of two hundred years of slavery, that the constitution of Pakistan may win the hearts of the people, it is rather by breaking the British idols of servitude and importing

the British ideal of Liberty that it can create a free people willing to live and to die for its own patriotism.

The District Councils would do well to adopt the principle of separation of powers as adumbrated in the "committee system" so that a heterogeneous body of say two hundred councillors may not attempt to do everything and end by doing nothing. It would, on the other hand, do well to entrust every function or set of functions to a small committee of councillors who would specialize in their different spheres and submit their final plans for ratification by the Council as a whole. Committees for the administration of Justice, Police, Elections, Public Health, Roads and Bridges, Agriculture, Co-operative credit, Housing Public Health, etc., should work intensively in their own spheres and obtain their own results. As Laski pointed out "where there is really one good committee on a council, its purposive energy will stimulate others, and thereby the council itself, into creativeness" * * * * It has not only been a nursery of local statesmanship, some of it of remarkable quality ; it has served also as a means of fertilizing Westminster with the results of local experience. Its success has been a safeguard against that easy tendency to centralization which is the paralysis of effective self-government * * * * No doubt

areas will have to be revised and powers reorganized; but when this is at long last accomplished, the technique of the committee will certainly be found to be the pivot which makes possible the democratic operation of local government."¹⁹³

Our statesmen and philosophers have declared again and again that Pakistan would be an Islamic state which has become a bugbear to the minority community of Pakistan as well as to the majority community of India. Without delving into the deeper and nobler significance of this declaration they have condemned the idea on hearsay evidence which is neither admissible nor intelligible. The word "Salam" means "Peace" and Islamic Government cannot mean and does not mean anything else in the world than a Peaceful State, a State in harmony with itself and with all its component parts, a state which is wedded to the ideal of Peace and Peace alone. It therefore negatives the idea of a totalitarian state, a corporative state or a theocratic state, but implies a state in peace with God and man. As the following two stanzas would illustrate:—

"When it is said to them :

'Make not mischief on the earth'

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They say : 'why, we only

Want to make peace !'

"Of a surety, they are the ones

Who make mischief,

But they realize if not. ¹⁹³

* * *

"And the servants of (God).

Most Gracious

Are those who walk on the earth

In Humility

And when the ignorant address them

They say "Peace", ¹⁹⁴

This noble idea gradually percolated in to Europe with the advent and gradual spread of Islam. Although Aristotle had laid down that "Virtue" was the end and aim of a "true" state as a final political concept long before the dawn of Islam, no political constitution could be drawn up and political programme enunciated on the abstract ideal of "virtue". Fifteen hundred years after a new school of political thinkers arose in Europe who bathed in the spiritual light of Islam through the Reanissance gave the world a re-interpretation of Aristotle in understandable language. Such a one was Marsiglio of Padua (1278—1343), who laid down that the end of all civil government was "Peace" and attainment of

¹⁹³, Quoran ; S. II 11-12,

¹⁹⁴. Quoran : S ; XXV : 63.

peace was the only end for which the form of government should be carefully considered. The idea of this revolutionary thinker remains true to our own days so that the international organizations set up in the Twentieth century like the League of Nations or U. N. O. have and exist for, the only purpose of maintaining "Peace".

Peace thus being the only rational end of all national States, all citizens must have the education of working for peace and law, order and peace cannot be the function of a salaried and liveried band of public servants alone. As a matter of fact in England police duty is and was a duty of every citizen and salaried police was introduced there only in recent times for the sake of efficiency. Even then the control of the local police was vested in the counties previously through the justices of the Peace and since 1888 through the Joint Committee of an equal number of Justices of the Peace and county councillors. In other words any possibility of a clash of interests between the administered and the administrators must be eliminated at all costs and the administrators and the administered must be absolutely identified in an ideal democratic government. Islamic state envisages such a form of government where complete harmony exists between the masses and the classes

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administered and the administrators, rulers and the ruled and man and his maker. The Islamic state therefore stands for peace, peace between all the warring elements in the state which go to wreck the organic character of human society, peace in the highest and noblest as well as ordinary pursuits of life, peace of the body and peace of the soul of all mankind. Those institutions which create mischief, inequality and injustice on earth must be obliterated and other institutions must be created to establish harmony, peace and goodwill. Unless the State can achieve that purpose, no use calling it an Islamic state, whether in Arabia or the Antarctica. Separation of Powers through a decentralised system of local government, whether political, economic or functional, is a necessary and vital step towards the establishment of such a state whether one calls it the Democratic State, the Islamic State, or the Islamic Democracy. As warned in Sura Nahl (XVI : 75-76) let us not be slaves under the dominion of a hierarchy of Civil Servants and be a wearisome burden on them let us rather be free agents, bearing our own burdens and directing our own affairs like the equal of all free peoples of the ancient and the modern world.